

MARQUETTE LAWYER

FALL 2021

THE SPORTS LAW ISSUE

The Winning Career Record
of Marquette Sports Law Alums

Ray Cannon, L'1913, Sports Law Pioneer

Assessing the Off-the-Field
Tumult in College Sports

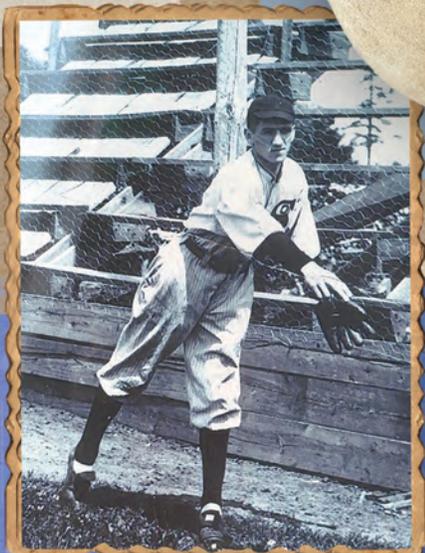
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Chicago's *Lakefront*—The Story of the
Public Trust Doctrine

A Faculty Conversation on the Criminal
Justice System

The Law School in the World War II Era

Honoring Professors Edwards and Williams



Joe J. Cannon



Meeting People in a Pandemic

Carpe diem, my mother used to say. She took the phrase from Horace, of course, and she gave it a different spin or interpretation from some. For her, “seize the day” was no Epicurean imperative but, rather, a reminder that each day brings with it opportunities—often in the form of new people to meet.

This has seemed to me among the many great challenges of the COVID era. It is hard to meet new people. Ordinarily, for example, Eckstein Hall, the extraordinary home of Marquette University Law School, is full of visitors coming to us for distinguished lectures, civic discussions, continuing legal education programs, or brown-bag lunches associated with our pro bono programs (not to exhaust the list). Eckstein Hall is, as promised from the earliest beginnings of the building project, both open to the community and designed to foster a sense of community.

Now, of course, in the temporary constraints on these opportunities (and even as we are gradually reopening to the public), one has to work harder to meet new people, to learn about them and their careers, to gain insights from their experiences. To an extent, yes, it is easier, in that a Teams or Zoom meeting can be done from one’s office or even home, but no one doubts that such a remote format also has considerable downsides, with respect to the relative quality of the typical interaction.

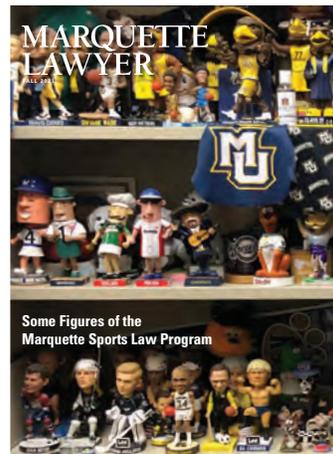
Thank goodness that one constant in this challenging time has been the availability and importance of reading. Surely, this is a good thing in general for legal education, whose central building block remains the study of legal doctrine and which places great emphasis on helping students develop the closely associated skill of legal writing. Indeed, it is without apology that I tell first-year students that they will largely teach themselves the law, beginning with their reading. (You will not doubt that it is *with apology*, in an older sense of the term, that I defend and clarify the statement to them.)

This brings us, then, to the latest issue of the *Marquette Lawyer*. It is our sure hope that we will

give you here, as a reader, the opportunity to learn something—about our alumni and students in the sports law program; about our faculty and their work, particularly in sports law and criminal law; about two of our emeritae faculty; about individuals who formed our community during World War II; and about a number of others. All of this is to say that, in an imperfect sense, we give you here an opportunity to *meet* people.

Many of these people may be new to you. In the lead story, for instance, we chronicle the unfolding career journeys of a number of our graduates and students who studied or are studying sports law here. Space constrains us greatly, and I regret the absence of so many other engaging figures from our sports law program.

Besides not running the story, the only way for our editor not to make choices among actual people might have been to profile the bobbleheads in Professor Paul Anderson’s office. We got ready just in case (see the alternative cover to the left), but that idea didn’t seem a particularly good one.



* * * *

My mother made the point other ways. The question each evening was less likely to involve what one had done that day and more likely to concern *whom one had met*—on the bus, at school, or otherwise. Any encounters thus recounted would have had the advantage of involving two-way communications—conversations. A magazine cannot do *that*, but there are people of ours to meet here.

Joseph D. Kearney
Dean and Professor of Law

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Pandemic (or War) Notwithstanding

Kudos to the editors of the *Marquette Law Review*, at its annual gathering this past spring, provide the opportunity to recall as well the World War II era at the Law School, through excerpts from past Marquette Law School Faculty Blog posts by the late Professor J. Gordon Hylton.



Francis X. Swietlik shakes the hand of Clifford Thompson, the tallest graduate of Marquette Law School, outside the doors of Sensenbrenner Hall, ca 1944.

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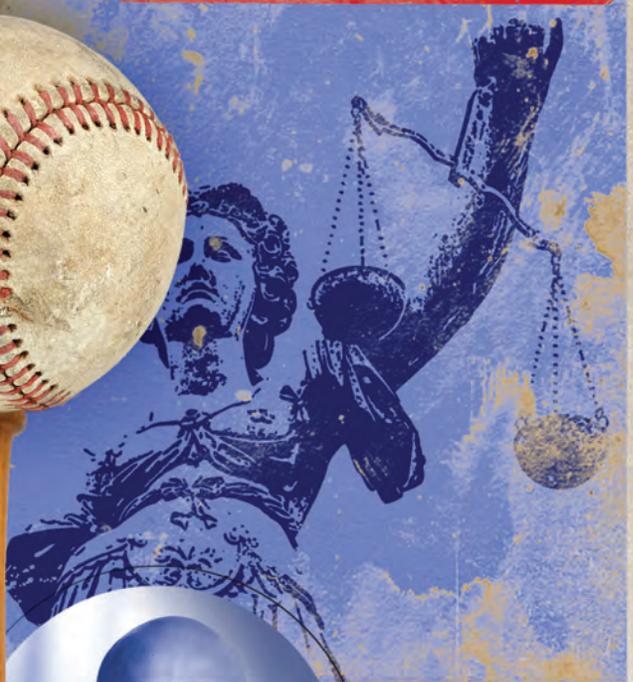
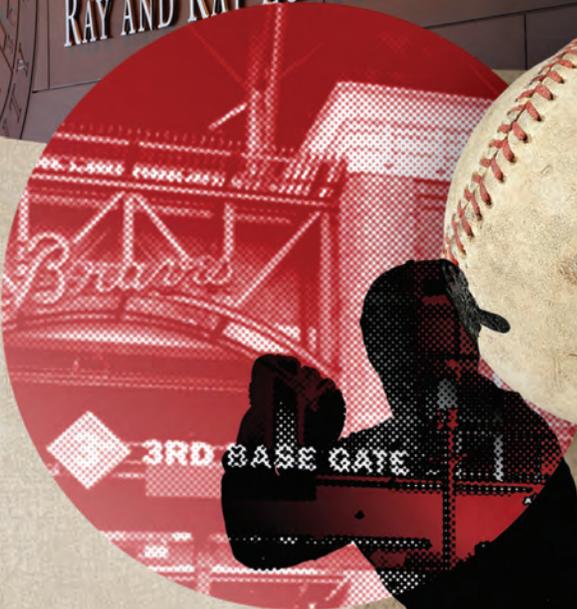
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A WINNING RECORD

In the pros, in university athletics departments, in classrooms, in business offices, in law firms, and elsewhere yet, the Marquette lawyers who participated in the school's sports law program are building vibrant careers.

By Alan J. Borsuk

Mahmood (Momo) Abdellatif grew up just outside of Atlanta. A big sports fan, he wanted a career connected to sports, even if he wasn't going to be an athlete.



Mahmood (Momo) Abdellatif

He got his undergraduate degree from Berry College, a small private liberal arts college in northwest Georgia. In the mid-2010s, he followed developments on the Atlanta sports scene, particularly construction of Truist Park, a new baseball stadium for the Atlanta Braves, and Mercedes-Benz Stadium, now home of the Atlanta Falcons.

Abdellatif told himself that there must be a lot of lawyers involved in the stadium projects. A career goal formed: He wanted a career along the lines of those lawyers.

On March 31, 2017, when Truist Park opened, the people who played central roles in making it a reality were introduced on the field. "That was pretty surreal and pretty neat," recalled Greg Heller. "Professionally, that was a highlight." As executive vice president and chief legal officer of the Atlanta Braves, he had earned his place in the spotlight.

Heller and Abdellatif don't know each other. But in an important way, they are linked. The career path of one and the career possibilities of the other both are tied to Marquette Law School, its nationally renowned sports law program, and the work of the National Sports Law Institute, part of the Law School.

Heller, L'96, goes back to a time when the National Sports Law Institute was housed separately from the Law School, and Martin Greenberg, L'71, a full-time Milwaukee lawyer with a strong interest in sports and part-time member of the Marquette law faculty, was spearheading the rise of the program. Heller became assistant team counsel of the Atlanta Braves in 2000 and general counsel in 2007. "My run is anything and everything legal," he said. The projects to construct the baseball stadium and the Battery Atlanta, a large adjacent entertainment district, are among the top accomplishments in which Heller has played a role.

And, for his part, Abdellatif is now in his third year at Marquette Law School. His interest in the law, sports, and efforts that benefit the general public led him from Georgia to Marquette. Following a summer clerkship at the Milwaukee law firm of Godfrey & Kahn, he was offered, and accepted, a full-time position with the firm's corporate team after graduation. He continues to have a special hope: that, at some future point, "I will be working with organizations to develop sports facilities," he said, especially in places around the world where poverty is high and opportunities for recreation are not good.

Successful pasts, rewarding presents, paths to good futures—all three are central to determining whether any higher education program is successful. Marquette's sports law program stands on all three. We offer here profiles of a few Marquette lawyers and current students. It's far from a comprehensive look at people who have benefited from, or who contribute to, Marquette Law School and its sports law specialty. But their stories help illustrate the history, current work, and direction of the program.



Aurusa Kabani

CHAPTER 1 Team Orlando

In the spring of 2018, the Law School was getting ready to host an event for potential sports law students. Paul Anderson, director of the school's National Sports Law Institute, asked **Aurusa Kabani**, then a second-year law student, to help by picking up one of the main speakers from the airport. What Kabani did not know was that Anderson had more in mind than a ride—he wanted Kabani to meet the speaker, **Nyea Sturman**, L'03, vice president and general counsel of the Orlando Magic NBA basketball team.

On the drive to campus, Sturman and Kabani struck up a conversation beyond their careers. For one thing, each of them has a deep love for travel. That evening, they talked for hours about their travels, families, and even the weather, Kabani recalled. "We built an immediate friendship on passions other than sports." By the end of Sturman's visit, she had given Kabani her contact information and asked her to stay in touch.



On the basketball court of the Orlando Magic (from left) are Andre Salhab, Nyea Sturman, Danez Marrable Lockhart, and Mario Harmon.

Image by Gary Bassing

They did. Sturman became a mentor for the student. Kabani, L'19, applied to the Magic for an internship for lawyers who had recently completed law school. Sturman took herself out of the interview process, and Kabani met with Andre Salhab, associate counsel for the Magic—and a 2012 sports law graduate from Marquette. After rounds of interviews, Kabani got the internship. She said it was the best way for her to gain practical experience in drafting agreements, understanding risks, handling negotiations in the sports world, and similar matters.

Looking to her next step, Kabani was in regular contact with the general counsel of the Orlando City Soccer Club, which has both a Major League Soccer team and a National Women's Soccer League team. She attributed landing the role as director of legal affairs for the club in June 2020 to what she learned interning under the Magic's legal team. "They helped build the very foundation where my career in sports has an opportunity to thrive." She has a long-term interest in getting involved in international sports, and the club frequently hosts soccer events involving teams from around the globe, which means, Kabani said, "my world stage has already begun."

Building relationships. Making connections. Joining informal as well as formal networks. These are keys to success for a sports team. And they're keys to success for the Marquette sports law program, known for the way many Marquette lawyers help current students get launched into careers.

Nyea Sturman, whom we have already mentioned, is a good example of a team builder. She's involved in a lot of teams. Four of them are actual sports teams. As vice president and general counsel, she is involved not only with the Magic but also with three teams connected to the Magic: the Lakeland Magic G-League basketball team, based in Lakeland, Fla.; the Orlando Solar Bears, an ECHL hockey team; and Magic Gaming, the NBA 2K League e-sports team.

But another team—her Marquette sports law team—also is important to Sturman. "We have an all-Marquette legal services department right now," she said. In addition to herself and Salhab, it includes Danez Marrable Lockhart, L'03, and a new addition, Mario Harmon, L'20, who was named this past September to be the legal services graduate associate for the Magic. In a broader sense, Marquette's Orlando sports law team also includes Kabani, who remains close with Sturman and other team members, Stephanie Galvin, L'14, who worked as a legal intern for the Magic before

taking a position with the Miami Marlins baseball team for five and a half years, and Jessica Goldstein, L'17, who interned with the Magic before going into private practice. Galvin recently joined Legends, a large provider of services to professional sports teams, based in Dallas.

Sturman has chosen her legal team not out of loyalty to Marquette but based on the caliber of who they are as people and as attorneys. She is proud of the work her colleagues do, proud of the growth of the Magic's legal department as the business itself has grown, and proud of the other careers she has boosted.

But Sturman does feel loyalty to Marquette, based on her own law school experiences and subsequent success. Like many sports law alums, she stays in touch not only with law school friends but also with Paul Anderson, the sports law program leader known to many students and alums by the initials "PA," and National Sports Law Institute Executive Director Matt Mitten. Sturman frequently takes part in programs for current students.

"I continue to try to pay it forward to the next generation of Marquette sports law alums," Sturman said. "Marquette gave us the foundation through not only coursework and the study of the law but also the exposure to sports industries, both from academic and practical hands-on perspectives."

Sturman grew up north of New York City. She was involved in varsity sports in high school and in college at Cornell University, where she majored in industrial and labor relations. She also had an interest in becoming a lawyer but didn't want to practice criminal law as her father did. Something that combined the law and sports—that's what she wanted.

She took every course she could in college that involved sports, and especially labor relations in sports. At the time, in the 1990s, major professional sports leagues had gone through tumultuous labor disputes. Labor law, labor history, and labor economics courses appealed to her, and she applied the content to sports whenever she could for papers and projects.

When it came to looking for a law school, her research led her to Marquette, even though she had no other connections to the school or Wisconsin. It worked out well, including internships with the Milwaukee Bucks basketball team and the Pettit National Ice Center in Milwaukee.

After completing law school, Sturman earned a master's degree in business administration at the University of Oregon, with a certificate in sports business. As soon as she graduated, she got a job offer from the Magic. There wasn't an in-house

legal team at the time. But legal needs grew, and “bit by bit, the legal aspect of my job became more significant” until she ultimately was tasked with co-founding the organization’s legal department, which she has led for the past nine years.

Andre Salhab’s mother was from Trinidad and his father from Grenada. He was born in New York, and for most of his childhood, the family lived in Florida.

How did he end up in Milwaukee? He attended the University of Florida and majored in public relations with minors in theatre and leadership. Regardless of what he did as an undergrad, Salhab always had known he wanted to be a lawyer, though which field of law was a question mark. He decided that he wanted to focus on sports or entertainment law, two areas for which he always had a passion. So how did he choose Marquette? “I did not know anything about Marquette,” but he received a pamphlet about Marquette Law School and its sports law program. “The more I looked into what the program had to offer, the more I could envision myself there.” The rest is history.

He gives a special shout-out to Stephanie Nikolay, Marquette Law School’s longtime director of admissions and recruitment, who helped him in 2009 with questions about moving to Milwaukee and other needs. “She was so welcoming,” Salhab said. “It was Stephanie who really sold it.” And his girlfriend (now wife) agreed to the move so long as they could bring along their dog and he promised they would move back to Florida after graduation.

What did Salhab say was one of the most important things he learned during his time at Marquette? “I am sure Marquette law students have heard it at least once or twice, but network, network, network,” Salhab remarked as he laughed. And network he did.

His mother had worked for Disney in Orlando for many years. Over the years, he used this as an opportunity to meet a number of Disney attorneys in an effort to learn and network as much as possible. After his second year in law school, Salhab got a summer legal internship with the Disney Vacation Club. He worked there after graduating from Marquette in 2012, and in 2013 he had the opportunity to move into a role in the business affairs department at Disney’s ESPN Wide World of Sports Complex.

How did he get that opportunity? You guessed it—networking. Then, in 2017, the Law School’s Anderson sent

him a notice that the Orlando Magic had an opening for an associate counsel. Salhab applied and, after a rigorous interview process, was offered and accepted the role. Salhab has been with the team since.

“Working for an NBA team is not an easy thing,” Salhab said. “It’s a demanding job, but it truly is a rewarding experience, especially when you get to work with an amazing team.” But even amid the stress, he said he loves the work and the value he can bring to the team. “We are the one-stop shop for all things legal, and each and every day is a new adventure,” he said.

Danez Marrable Lockhart has always had a wide range of interests, including an early interest in becoming a lawyer. She grew up in Michigan and Ohio. During her senior year at Ohio University, she worked in the athletics department. The experience led her to decide to pursue a career in sports law. She stayed at Ohio to earn a master’s degree in athletics administration. Marquette, with its sports law program, was her choice for law school.

While in law school, Lockhart’s many involvements included interning with the Milwaukee Bucks, clerking for Foley & Lardner, and working for a boutique tax and entertainment law firm. She also volunteered in the Law School’s family-law self-help clinic and served as director of the Midwest region of the National Black Law Students Association.

After law school, she worked for athletics departments at universities in South Carolina, Georgia, and Alabama, including positions involving compliance and life-skills/student-athlete development. Lockhart also directed a professional development institute through the National Association of Collegiate Directors of Athletics. She moved in 2013 to Orlando, where her husband worked. Lockhart transitioned into working in professional sports, including the continuing education program for the NFL.

Lockhart was a classmate of Sturman at Marquette, and they stayed in touch. In 2017, when an opportunity to join the Magic’s legal department arose, Lockhart was selected. The position combines her love of sports and the law and allows her to balance work with the two things she values the most: faith and family, including her young child.

Stephanie Galvin was about 14 when she knew that she wanted to be a lawyer. It was only some years later that she found out that there were lawyers



Stephanie Galvin



IN THE ON-DECK CIRCLE LOGAN DEENEY

Internships are an important experience for many students in the Marquette Law School sports law program. Logan Deeney has had two internships that taught him a lot: one in the compliance office of the

Northwestern University athletic department in Evanston, Ill., and one in the United Soccer League office in Tampa, Fla.

To be accurate, though, neither internship was actually in Evanston or Tampa. In line with so many other things during the coronavirus pandemic, both were done virtually. That didn't keep Deeney from getting the most out of them, just as he has gotten the most out of the pandemic-shaped twists of his first two years in law school. As he put it, he hasn't known what a "normal" year is, given all that has happened since March of his first law school year.

There have been some upsides to the pandemic's impact, Deeney said. With two young children at home in Milwaukee, doing an internship in person in Tampa might not have worked. On the other hand, Deeney said, doing an internship from home with young children around has taught him flexibility and how to use time effectively.

Both Deeney and his wife grew up in Billings, Montana, and attended college in California. When it came to a career path, Deeney wanted something that combined a pair of his big interests: sports and law. He researched where the two could come together, focused on Marquette, and, after a pair of visits to Milwaukee, made a choice that has worked out well for him, even amid the pandemic.

Now in his third year in law school, Deeney is a candidate for a sports law certificate and is part of a team representing Marquette this fall at the National Sports Law Negotiation Competition in San Diego, Calif. He is also interning in the office of the general counsel for Marquette University.

Deeney said that beyond academic content, the law school experience had taught him to get out of some of his comfort zones and how to step forward more. Plus there have been those lessons about work-life balance, amplified by the pandemic's impact. "I couldn't ask for a better experience," Deeney said.

who worked in the sports world. It was then that she set a goal to become one of those lawyers.

Galvin grew up in Vancouver, Canada, and majored in business at the University of British Columbia. When she started to apply to law schools, she had no idea where Wisconsin was. But her research on law schools led her to focus on Marquette and its sports law program. "What really got me was the network of alumni who were out there working in jobs that I wanted, in the industry that I wanted to be in," she said.

She immersed herself in developing her career possibilities. In three years, she got a law degree and a master's in business administration, also from Marquette, and she served as the editor-in-chief of the *Marquette Sports Law Review*. She also took on numerous internships, including with the Charlotte Hornets (NBA), the Milwaukee Brewers (MLB), the National Labor Relations Board, Wisconsin Court of

Appeals, and a boutique sports law firm in Chicago. (While studying at Marquette, she also met her now husband—another Marquette lawyer.)

"I wanted to make myself a candidate that somebody couldn't say 'No' to," she said. "I tried to do as much as I could in the time that I had at Marquette, so that when an opportunity arose, they couldn't turn me away."

After completing law school in 2014, she was hired by a small law firm in San Diego led by a Marquette lawyer. Then—here's that name again—Nyea Sturman, who had been a mentor to Galvin, had an opening, and after multiple conversations and interviews, offered Galvin a post-grad legal internship with the Magic. It was for one year, but Galvin thought, "I believe in myself. I know that when I get there, I'll prove myself and make something happen. I just need a chance."

Sturman gave her that chance and Galvin was right. She subsequently joined the legal department of the Miami

Marlins (MLB). After five and a half successful years as the Marlins' associate general counsel, she took a position in 2021 with Legends, a premium experience company that provides a multitude of services to sports franchises, entertainment companies, and venues. Galvin is the director of business and legal affairs for Legends' Hospitality and Global Merchandise divisions. As she characterizes the work, "We are a one-stop shop. The specific services provided depend on the client. But Legends is able to assist with almost anything a sports team or entertainment company needs."

"I've been fortunate in the opportunities that have come up," Galvin said. "With every opportunity, I continually try to do my best and enjoy the moment. I really couldn't ask for more at this point in my career." And, yes, she still stays in touch with Sturman and with the Law School's Paul Anderson. She calls them "amazing mentors and friends." >>



IN THE ON-DECK CIRCLE
MORGAN HINES

When Morgan Hines started at Marquette Law School in fall 2019, Paul Anderson, director of the sports law program, gave her three pieces of advice: Show up. Volunteer. Be involved. Morgan is a self-starter. “I always do as much as I can.” Following Anderson’s advice has not been hard for her.

Hines grew up in Milwaukee and went to the University of Wisconsin-Madison for her undergraduate education. She considered going to law schools on either coast for an academic, social, and professional experience beyond Wisconsin. But, after meeting with Anderson in 2018, she said, “I told him, ‘Marquette is the place for me.’” She added, “He believed in me as a student. He wanted to see me excel. He was genuine.” She went to an event for admitted students in spring 2019 that allowed her to meet sports law students and alums. “It’s really like a big family—we’re here to support you.”

After the death of George Floyd at the hands of a Minneapolis police officer in May 2020, Hines told Anderson that there needed to be discussions among students “to bring us together, address broad issues, and allow us to share how students feel and what we are experiencing.” That day, the Sports Law Diversity and Inclusion Committee was born, and Anderson “voluntold” Hines to be the chair. Since then, groups of students have been meeting with alums and organizations to learn more about the issues and the direct impact of those issues on individuals of diverse backgrounds.

Hines is also involved in the Black Law Students Association, and she is a student liaison for the Milwaukee Bar Association and a program mentor to other law students. “I’m a person who volunteers for things,” she said.

In the summer of 2021, Hines worked at the Milwaukee office of a large national law firm specializing in health law. She expects to graduate in May 2022 and has already accepted a position. Hines is energetically focused on writing her own success story.

is, and they’re able to make good decisions about their actions.”

A second component of compliance, she said, is to monitor what’s going on. From recruiting to how long practices can be to a wealth of dos and don’ts for coaches, there is much to oversee—and this now comes amid many changes around college sports.

Given all the rules, the third component of Bray’s work is enforcement, including what to do when someone violates a rule, whether major or minor, intentionally or inadvertently. Often that means involvement with the National Collegiate Athletic Association (NCAA) compliance officials.

Compliance has grown as an important component of what college athletic departments need and as a career focus of many graduates of Marquette Law School. Let us consider, as examples, both Bray and Brent Moberg of the University of Notre Dame, two Marquette lawyers who are making their marks in this field.

Bray grew up in Ohio and then Texas. She was involved in several sports as an athlete and got a bachelor’s degree from Texas A&M with a major in sports management. She set a goal of going to law school, and Marquette became her choice. Things worked out well, not only for what she did at Eckstein Hall, but for what she learned in internships in the Marquette athletics department and elsewhere.

After her second year in law school, she worked during the summer in the athletic department at Texas Christian University. “That was really an eye opener for me,” Bray said, and it settled a question in her mind whether she should aim to work in professional sports or college sports. An internship during her third year in law school with the University of Wisconsin-Madison athletics department firmed up her preference for college.

Getting her first position after completing law school in 2014 was not easy. Bray applied for 34 jobs and had 26 interviews before a position at Yale University popped up. It was intended to be a two-year internship in compliance with the athletic department, but she decided to take a chance on it. When her supervisor left, she was asked to do the compliance work solo. With help from others, including peers in other Ivy League universities, she did well. She was promoted to assistant athletic director and was given a position required by the NCAA of “senior woman administrator,” which meant Bray became involved in Title IX compliance, gender equity matters, and, in general, making sure women had seats at the table for a wide range of decisions related to

CHAPTER 2

The Complicated World of Compliance

Christian Bray, L’14, thinks of herself first as an educator. Her job as associate athletics director at Harvard University carries a range of duties, from liaison work with academic departments to advocacy for women athletes. But her primary job is compliance. That may sound somewhat heavy, given the need to enforce the large volume of rules around college athletics.

But Bray puts the work in a positive light: “Most important, we educate. We create an atmosphere where coaches and athletes know what they can and can’t do. They know where the line



Christian Bray

sports at Yale. She also oversaw some specific sports programs, including volleyball and gymnastics.

In 2018, Bray moved to Harvard, where she is associate director of athletics, with a focus on compliance. She also works on “academic integration” for student athletes and is a liaison for the athletic department with other parts of the university, including the office of the general counsel. As at Yale, she has been given the position of senior woman administrator.

As prestigious as the Yale and Harvard names are, they have comparatively small athletic staffs. Bray said many people interested in legal compliance work want to be part of programs of the “Power 5” athletic conferences. She suggests that “mid-major” programs may offer ripe opportunities to grow professionally. She is a good example of how that is so.

Brent Moberg, L’04, is an example of someone who has made a successful career focused on compliance at an athletic powerhouse—in fact, one of the most famous names in college sports, Notre Dame. How he arrived there is complicated.



Brent Moberg

Moberg grew up in Rockford, Illinois, and enrolled as an undergrad at Notre Dame, with intentions of being a doctor. But early in his senior year, “I had a pretty life-altering event happen,” as he put it. Without warning, he suffered a traumatic brain injury, similar to a massive hemorrhage. He said doctors did not expect him to survive or expected his brain function would not recover in full. “A lot of very amazing things happened to me,” he said. The Notre Dame community united in ways that included prayer gatherings and banners all around campus drawing attention to his situation. And he recovered, despite the medical forecasts.

After completing his undergraduate work a year behind his original schedule, Moberg enrolled in a medical school in Illinois. “It just never felt right,” he said. He took the LSAT and applied to law schools, including Marquette. “I had no idea Marquette had a sports law program,” he said. “That was completely news to me when I decided to go to Marquette.”

But he chose Marquette and during orientation, he heard people saying they came for sports law. “That was the first I had heard of sports law,” Moberg said. But he went to an alumni career panel, “just trying to keep my options open.”

One of the speakers was Keith Miller, L’01, then a lawyer working in athletic compliance at the University of Southern California (and now associate athletic director for compliance at Texas A&M University–Corpus Christi). Moberg found it interesting. He subsequently went to an NCAA seminar in Chicago on the subject. Miller was there and introduced Moberg to other practitioners involved in NCAA compliance. Moberg took every opportunity in law school to learn about the subject, including through internships ranging from South Milwaukee High School to a minor league baseball team (at the AAA level) to the Marquette University athletics department.

In his first internship, Moberg worked for Shawn Eichorst, L’95, then athletic director at the University of Wisconsin-Whitewater. Eichorst went on to leading positions in athletic departments at several universities and is now a consultant on intercollegiate sports matters—and has been a mentor to Moberg.

After completing law school and receiving an M.B.A. degree from Marquette, Moberg was hired in 2006 as director of compliance at Northern Illinois University. In 2009, he was hired for similar work at Notre Dame. His biggest task is to oversee recruiting for all 26 sports the university offers. Each person working in compliance works with specific teams, athletics units, and university offices on compliance issues. For Moberg, the teams are men’s basketball, hockey, men’s lacrosse, women’s golf, and women’s tennis. Also among his duties, he coordinates and manages the compliance office’s internship and externship programs.

Moberg said, “Some of the best advice I ever got [early on at Marquette] is that, where possible, the answer should never be ‘No.’” When coaches or athletes come to him with an issue, the goal is to find ways to do things right. Sometimes that means telling them that they can’t do it the way they might like but then offering alternatives that might come close. That builds trust and relationships, he said.

Moberg also works with colleges and universities as a consultant for CarrSports Consulting on issues such as strategic planning, addition of sports, and changing the NCAA division in which institutions compete.

“I still do enjoy compliance an awful lot,” he said. And he connects his career success strongly to his time at Marquette Law School. “I never in a million years would have imagined the doors and the pathways and the relationships that have been opened up for me,” Moberg said. “Nothing happens without Marquette; nothing happens without Paul Anderson.” ▶▶

CHAPTER 3

From Student to Teacher

Kerri Cebula, L'06, grew up in a family of car-racing fans. Now she is a professor teaching sports law, with a research specialty involving Formula One cars.



Kerri Cebula

But the path to being an expert who talks often with professional auto-racing insiders (“they like to gossip like little children”) had unexpected twists. A big one was the fact that Marquette played Villanova in basketball on November 15, 2002. (Marquette won 73–61 at Madison Square Garden in New York, although that’s not relevant to this recollection.) Let us explain.

At that point in her career, Cebula was working in the athletics department of Villanova University and was involved in compliance work, although she was not a lawyer. The NCAA launched an investigation into allegations of earlier violations involving the university’s basketball recruiting. Cebula said one incident involved a coach who arranged for recruits to have lunch at a Philadelphia-area cheese steak restaurant. The coach was in the restaurant. Under the rules, he was not allowed to have contact with the recruits at that point. He didn’t speak with them, but he was alleged to have made eye contact, which investigators thought was a violation.

As the university dealt with this, Cebula said she was part of an hour-and-a-half-long meeting discussing whether eye contact constituted an NCAA violation. “I walked out of that meeting and said, ‘That’s it—I’m going to law school,’” she recalled. She looked at the Villanova men’s basketball schedule and researched which schools had a sports law program. The answer was Marquette.

Cebula had no prior contacts with Marquette or Milwaukee, but she ended up enrolling. “I went purely for the sports law program,” she said. “It worked out very well, obviously. It was a great education.” She built relationships that she maintains now, and she got on track for a career teaching sports law at the college level.

Since 2012, she has been associate professor of sport management at Kutztown University of Pennsylvania, an 8,000-student state university about 70 miles northwest of Philadelphia. She teaches courses including sports management,

sports law (within the College of Business), and professional sports governance.

And then there is her legal research into auto racing. Her focus is on trade secrets, mostly related to engine design. Many aspects of Formula One cars involve trade secrets, she said, and people are adamant about protecting them. The last several years have seen several major disputes. This, of course, makes Cebula’s work more relevant and, for her, more fun.

Cebula said her Marquette sports law credentials have been an asset throughout her academic career. “When people hear that, the prestige goes up,” she said. “People say, ‘Oh, you know what you’re talking about.’”

“I will be forever grateful for whoever scheduled Marquette versus Villanova that year,” Cebula said. “The education that I got was phenomenal.”

Mark Dodds, L'05, was successful in his sports marketing job. But he had what he called “a mini-midlife crisis” after several years. He liked the work, but. . . . He knew one of the things he liked most was teaching new employees about sports marketing. “I thought, if that’s what I like to do, I should do that.” And so he has.



Mark Dodds

Dodds grew up in upstate New York and graduated from Syracuse University with a business degree in marketing. He got an M.B.A. with a concentration in sports marketing from Robert Morris University near Pittsburgh.

He got a good job with GMR, a large and well-regarded sports marketing agency based in New Berlin, Wisconsin. His work included involvement with regulatory compliance for some of the company’s clients. That got him interested in sports law—and he knew that Marquette Law School, with its sports law program, was nearby. While still working at GMR, Dodds began taking law school courses.

He said he gained a lot from his law school experience, but he never wanted to be a lawyer in practice. He credits Marquette professors, including Matt Mitten, executive director of the National Sports Law Institute, and Paul Anderson, with teaching him how to teach. Since shortly after graduating in 2005, he has taught at the State University of New York-Cortland, south of Syracuse. Along the way, he also received a Ph.D. in marketing from the University of Jyväskylä in Finland.



IN THE ON-DECK CIRCLE

CAYLA MCNEIL

Cayla McNeil remembers vividly one day when she was taking an undergraduate class in sports law at Otterbein University near Columbus, Ohio. That day, the class had a guest speaker. She was a Black woman, a judge, and a powerful speaker. Awed, McNeil went to her professor after class and asked if she thought McNeil was qualified to go to law school. The professor said, “Yes.”

For McNeil, growing up in suburbs of Detroit and then going off to college, sports had been a big part of her life. She played lacrosse at Otterbein, but an injury ended her competitive days. “I really had to get out of fantasyland and think about what I want to do after sports,” she said. Becoming a lawyer appealed to her. She did an internship in the office of a family friend who was a lawyer in Nashville, Tenn., and was impressed with the connection between lawyers and clients. “I just fell in love with that relationship and the commitment you have to your clients,” she said.

A chance to job shadow with the Columbus Blue Jackets professional hockey team and intern in the University of Detroit Mercy athletics department firmed up McNeil’s interest in sports law and put her on a path to Marquette.

Now in her second year in law school, she has become active with the Black Law Students Association and the school’s Sports Law Diversity and Inclusion Committee. Over the summer, she had a virtual legal internship with Nike, “a company that I’ve dreamed about all my life.” She was pleased with how she handled the internship’s demands.

McNeil wants to pursue a career that includes involvement in social activism among athletes. McNeil said, “It’s been an exciting time to be alive in the past five years because we see athlete activism on big stages. . . . Athletes have been using their platforms to start demanding a change in the culture and to promote a better culture of inclusivity.” She added, “That’s something I really want to work on in my career.”

As he hoped, Dodds has found teaching rewarding. “I like to talk to the students, I like to present the material, I like to get their feedback,” he said. He teaches sports law, but the actual content of his courses covers a lot more, Dodds said. That includes teaching about the way the legal system as a whole works, and side trips into many hot subjects. Dodds said, “Sports is a gateway to discuss things that people otherwise might not be talking about.”

Dodds said that other sports law professors around the country who are Marquette lawyers are key colleagues in his professional circle. For years, they have met frequently at conferences, collaborated in writing academic pieces, and just been a friendly peer group. “The Marquette mafia,” he jokes. “That’s probably my closest network.”

CHAPTER 4 In the Big Leagues

Consider two lessons from the career path of **Jessica Boddy, L’06**.

The first: Pursuing big goals can pay off, but it sometimes involves patience. “I’ve always wanted to work for the NFL,” Boddy said. Since spring 2021, she has been doing that, as vice president/head of business affairs



Jessica Boddy

for NFL Films. Fulfilling that goal came after 14 years of working in roles that she really enjoyed. But nothing could compare to landing her NFL dream job.

The second: She wasn’t hired for her knowledge of sports or sports law. While at Marquette Law School, she took a course in intellectual property law. “From that class, I developed an interest in intellectual property,” Boddy said. She turned her interest into an area of expertise. With over 13 years at the media conglomerate Discovery, Inc., she developed a wealth of knowledge and experience in media production, rights, and distribution, all of which were big pluses when she applied for the NFL job.

Boddy is one of several Marquette lawyers who have made it to the big leagues. They would agree it is cool.

(Greg Heller, executive vice president and chief legal officer of the Atlanta Braves, said, “If I ever have a rough day and try to complain to my wife, she says, ‘C’mon; you go to work at a ball field every day.” His office overlooks the playing field, and, for years, the office of baseball legend Henry Aaron was just down the hall. Heller said Aaron was “just a true gentleman—the nicest, sweetest man you ever could have met.”)

But these alumni have gotten where they are by working hard, doing good work, and sometimes getting breaks. ▶▶



Boddy—she was Jessica Jones in her law school days—grew up in Annapolis, Maryland, and went to Florida A&M in Tallahassee as an undergraduate. A sports enthusiast who wanted to be a lawyer, she said she chose Marquette for its comprehensive sports law program (and despite the winter weather).

She expected to take a job in the Milwaukee area when she completed law school in 2006, but her mother was ill in Maryland, so she moved back there to help. Her mother died nine months later, but Boddy stayed on, joining Discovery and developing her knowledge of business and media affairs. She also earned an M.B.A. from Temple University in 2018.

When corporate changes led Discovery to close its office in Silver Spring, Maryland, Boddy was offered a transfer to New York. She and her husband agreed to move, with a long-term goal of landing an opportunity in sports in New York. When the position with NFL Films was posted, she went after it, even knowing there was a drawback: the work is based in New Jersey, an hour-and-a-half commute from where Boddy, her husband, and six-year-old child live.

But, she said, “It was a once-in-a-lifetime opportunity for me; something I didn’t want to pass up.”

Boddy is responsible for traditional business affairs oversight for NFL Films, as well as exploring development and strategic opportunities for Films to grow. Day to day, she works closely with others on new content and opportunities and with league colleagues on various NFL initiatives, and she negotiates deals. She recently has taken a more active role in the NFL advancement of diversity and inclusion.

“It has been everything I desired since I first set out on a sports law journey,” she said.

Success in finding a major league job came more quickly for **Krista Brown**, L’15.

Brown grew up in Winston-Salem, North Carolina, and went to the Winston-Salem State University as an undergrad. She was involved in several sports in high school and college. Midway through college, she set a goal of going to law school,

knowing that sports law appealed to her. She didn’t know anything about Marquette except that NBA great Dwyane Wade had played college basketball there. But after looking into her options, she concluded that Marquette had a particularly robust sports law program.



Krista Brown

Brown said that law school had one unexpected benefit: “It got me out of my shell a little bit.” She said, “Being on call in class [when a professor might call on a student to explain material] and that type of thing was a little jarring to me because I don’t particularly like to talk.” Getting involved in law journal work, curricular competitions, and other aspects of law school life furthered her personal growth. She said law school taught her how to stand up and explain things in front of others.

While in law school, Brown did an internship with the Milwaukee Brewers baseball team. Upon graduating in 2015, she applied for sports-related positions around the country. One was in the offices of Major League Baseball in New York City—and she got the job. She is now senior legal coordinator for MLB.

“Essentially, I draft agreements,” Brown said. “That is the majority of my job.” She works on product and sponsorships agreements, and is involved with work in the youth department, hiring trainers and umpires for youth events. “Every day is different; you never know what is going to come up,” she said. “Most days, someone will have questions—‘Can we do this?’ ‘Can we do that?’”

Many of the questions don’t directly involve what could be called sports issues. But then, Brown said, even if drafting a contract is similar across a wide range of client types, she likes that these contracts involve sports. And she gets involved in a wide range of legal needs—transactional law, intellectual property, youth protection, sometimes HIPAA or health privacy matters, because “all types of law converge on sports—that’s what I like the most.”

Greg Heller said that when he was starting out in the 1990s and was seeking a position involving sports law, the most common response he got was, “What is sports law? We don’t have a sports law practice.” He said that Marquette law professors, including Martin Greenberg and James T. Gray and Dean Frank DeGuire, were ahead of their time when they created the program in 1989.



Greg Heller

Now, he said, the field “has really exploded. . . . There is a ton of opportunity out there. It’s really phenomenal.” ▶▶



IN THE ON-DECK CIRCLE
QUINN STIGERS

Quinn Stigers grew up near Des Moines, Iowa, with a big interest in music. In school, she was strongly involved in choir and dance programs. She went to Iowa State University and majored in supply chain management in the business school. So how did she end up as the current editor-in-chief of the *Marquette Sports Law Review*?

She wanted to be a lawyer, with a specialty that combined her interest in entertainment with her strength in analytical thinking. The law surrounding all forms of entertainment is very similar, whether it is music or sports. All focus to large degrees on subjects such as contracts, intellectual property, and labor and employment. In short, a good sports law program is also good training for any form of entertainment law and for being a good lawyer more generally.

“That was what really sold me on Marquette,” with its depth of offerings in sports law, Stigers said. “I thought that would help me get into entertainment.”

Maybe it will. But Stigers has also found that she is interested in professional sports specifically, something enhanced by an internship with the Milwaukee Bucks, which she loved. Her involvement with the sports law review has been demanding, but worthwhile, she said, and it is the kind of role that appeals to potential employers.

Other avenues may lie ahead. Stigers interned during the summer of 2021 with the Milwaukee office of the large national firm of Husch Blackwell and will return after graduation to join its labor and employment practice group.

Stigers is optimistic about using her legal knowledge and skills to work on matters that appeal to her wide interests. And, she hopes, her career path will lead down the road to work involving professional sports.

When Heller completed law school in 1996, he got a job with an NBA agent who had a small law firm in Atlanta. That firm became part of a large Atlanta law firm, Powell Goldstein, and a former colleague of Heller at Powell Goldstein who was in-house at the then-thriving Turner Broadcasting and Turner Sports companies subsequently introduced Heller to Turner. At 29, Heller was hired to work in a three-person legal office at Turner that was handling major matters. “It was like a dream come true,” he said.

In 2007, when Turner sold off some of its ventures, including the Atlanta Braves, Heller became general counsel of the baseball team, later adding the role of executive vice president. Building the baseball stadium and the adjacent entertainment district, mentioned earlier, have been his two biggest projects.

“I’m sort of like the old, trusted advisor now,” Heller said. “My hair is all white now.” He said, “It’s been a good run. I wish I could freeze it. I wish I could slow down the clock.”

CHAPTER 5
**Sports Law Education,
Careers Outside Sports**

“I like to build things,” **Courtney Hall**, L’13, said. And she is doing that with New Source Medical, a growing health care equipment business based in Louisville, Kentucky. Like many sports law graduates of Marquette Law School, Hall is involved

in a legal practice that does not directly involve sports. In fact, a lot of her work doesn’t fit a narrow definition of legal work. She is involved in operations of the business, so much so that she was given the title of “chief operating officer”; for example, she gets involved in matters such as customer relations.

Hall is pleased with what she is doing, and she credits her sports law education with being an important ingredient in her success. As Marquette law professors have often said, being a good sports lawyer means being a good lawyer, and being a good lawyer can lead to a wide range of opportunities.

Hall grew up on a farm and in a small town in Kentucky. She fell in love with basketball and was good enough that she played for Mercer University in Macon, Ga., an NCAA Division I program.

But she wanted to study abroad, and that led to a semester at Oxford University in England, studying subjects ranging from international political economy to Jane Austen. “Jane Austen and Oxford was incredible,” she said. She considered law school in England, but realized that European Union employment rules were going to keep her from practicing there and that a British law degree wouldn’t help her in the United States.



Courtney Hall

So she headed back to the United States and began looking at law schools. The Kentuckian considered Marquette because “I’m a big basketball fan, and Louisville always played Marquette.” She had a bit to learn—she thought Marquette was in Pennsylvania. But Marquette’s sports law offerings appealed to her, and Eckstein Hall was beautiful, resolving her concerns about going to a boring law school in a dreary building.

Law school was challenging, she said, but rewarding. She was editor-in-chief of the *Marquette Sports Law Review*, and she interned with the Milwaukee Brewers while taking courses in subjects such as criminal law, business law, and family law.

After completing law school in 2013, Hall worked for a large law firm in Louisville. In 2014, she was hired by an entrepreneur, Kevin McKim, to join a small venture capital company. That led to her handling the legal side of the firm’s acquisition of a Florida health care equipment company, which was relaunched as New Source in 2016. Hall was one of the first employees, and soon her role expanded beyond legal work.

Her sports law background “has been huge” in helping her, Hall said. “My job would be a lot more difficult if I had not done it,” because she gained a breadth of information and skills.

Nathaniel St. Clair II, L’04, was well on his way to an excellent career as an electrical engineer when he met a patent lawyer. Now he has an excellent career as a lawyer in private practice in Dallas.



Nathaniel St. Clair II

That leaves a lot out of St. Clair’s dynamic life story. He grew up on the South Side of Chicago, excelled in academics and sports, got on track to learn engineering, turned down admission to MIT because he wanted to stay near family in the Midwest, and enrolled in the highly rated engineering program at the University of Michigan.

Before his junior year in college, he was interning for General Electric (GE) at a plant in Pennsylvania. In the course of observing and meeting people in different roles, he job-shadowed a patent lawyer. The work appealed to him. He developed the idea of going to law school and combining his engineering talent with a legal career.

He graduated from Michigan with a job offer from GE. St. Clair knew there was a GE operation in Waukesha, Wisconsin, still a short distance from family in Chicago. He could work there while going to Marquette Law School. And so it happened.

While in the sports law program at Marquette, he had an internship working for Ron Walter, then general counsel for the Milwaukee Bucks basketball team. St. Clair said that when he finished law school in 2004, his experiences with the Bucks and GE catapulted him into a position with the Foley & Lardner firm in Milwaukee, which included work with the sports law and intellectual property groups.

Much as he liked his time with Foley, after several years, he wanted to move to a new part of the country. He first worked at the firm of Jones Day and then, in 2013, joined Jackson Walker in the Dallas area, with a private practice that focuses on intellectual property law involving some of the nation’s largest corporations, especially financial institutions.

Along the way, St. Clair said, he spoke at a conference. A woman who heard him introduced herself and said she wanted him to help her son with some IP needs. It turned out her son was entertainer Kanye West, who was on the rise to super-stardom. St. Clair has also worked with other celebrity entertainers and athletes.

Pretty impressive, right? St. Clair said much of his success is built on the mentoring he got from people at Foley, including Sharon Barner, Joseph Ziebert, Jeanne Gills, and Walter. He was surrounded many times by “off-the-charts intelligent people,” St. Clair said, and he learned as much as he could from them. “Sometimes just being in the room and having the opportunities for exposure can predestine somebody’s success,” he said. “I can definitely say I had the opportunity as a result of my Marquette education and my Michigan education to be in the room.”

He said an important goal for him in coming years is to increase his efforts to mentor young lawyers. “Mentorship is tremendously important to me,” he said. “Without mentors in the legal practice, you don’t survive very long.”

Hassan Rahim, L’20, is at an early point on his career path, but has a similar goal to St. Clair’s: to be a mentor, to help young people, and to be someone whom “you can look at as a role model.” >>



Hassan Rahim



IN THE ON-DECK CIRCLE

PEYTON PHILLIPS

Peyton Phillips was asked, before the start of the fall 2021 semester, what his goals were for his second year in law school. To improve his study habits, he answered, and to get better at networking. The latter wasn't a strength of his, coming into law school. He got better at it in his first year, even amid the limitations that the pandemic imposed on interactions. He gives a big share of the credit to participating in sports law program events, particularly those in which alumni spoke with and answered students' questions.

Phillips grew up in Kenosha, Wisconsin, and got a bachelor's degree from the University of Minnesota. Growing up, he played hockey and loved to watch sports. But he also loved reading and writing. He knew he wasn't going to be a professional hockey player, and he wanted to be a lawyer. Sports law, and specifically going to Marquette Law School for the sports law program, became his goal.

Obviously, the strengths he is developing in networking and similar skills aren't valuable only in work related to sports law. They will help him in whatever direction he goes. Phillips said his ideal career would involve working for a professional sports team or league. But an internship in the summer of 2021 with Wisconsin Supreme Court Justice Ann Walsh Bradley suggests he will be ready to pursue other possible paths.

So far, law school has gone well, he said. But he has listened to the wisdom that the most important attribute of a good sports lawyer is to be a good lawyer, period. He appreciates also that a successful graduate of the sports law program may well end up in a good career that doesn't involve sports. Phillips said the leaders of Marquette's sports law program were providing good opportunities for students. He is readying himself to benefit from those opportunities.

When Rahim graduated from Marquette Law School, he joined a young nonprofit venture in Milwaukee called STRYV365 as finance and compliance manager, but also as an active part of the organization's efforts to help youths in Milwaukee deal with trauma and stress—or, as the organization's website puts it, to “equip youth with a resilient mindset through trauma-informed programming in education, athletics and activities.”

STRYV365 focuses its work on several Milwaukee high schools and colleges and has benefited from corporate sponsorships from businesses and nonprofits. The philanthropic fund of Bucks star Jrue Holiday and his wife, Lauren Holiday, a retired soccer star, has become a recent supporter.

Rahim grew up in North Carolina. The first Milwaukee sports star he rooted for was Marquette's Dwyane Wade, who went on to a superstar career in the NBA. (He has an autographed Wade jersey hanging on a wall in his office.) Rahim graduated from the University of North Carolina at Charlotte and worked for the Charlotte Bobcats (now Hornets) in marketing.

His brother encouraged him to learn to be a sports agent, which developed into an interest in becoming a lawyer with an emphasis on sports, which led him to enroll at Marquette. He said that he built many strong relationships while a law student and became connected to Milwaukee.

A lot of great people are working on making Milwaukee a better place for young people, Rahim said. “I have no doubt there is hope for the city,” he said. And he intends to be part of seeing the hope realized.

CONCLUSION

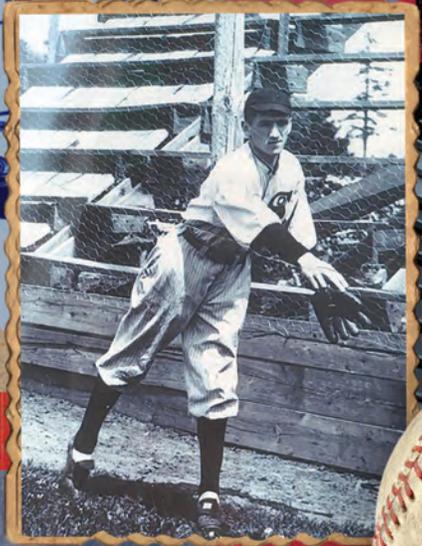
“I'm really upping my mileage.”

Momo Abdellatif, the now-student who watched from the outside as the Truist baseball stadium was opened in Atlanta in 2017 and who set a goal of being on the inside of projects such as that, is a runner. When he was interviewed, he was training for a marathon. “I'm really upping my mileage right now,” he said.

So it is with marathons. So it is with law school. So it is with career goals. To succeed in each, you need to be committed to going the distance. You need determination. You need to use your talents well and make smart decisions about your path. You need to dream, but you need to do all it takes to build good realities.

Successful paths, rewarding presents, paths to good futures. One can see all three in this selection of profiles of people involved in the Marquette Law School sports law program. Each story is different. But, at heart, each involves people who are upping their mileage. ■





JOE JACCO



RAY CANNON,

Sports Law Pioneer

Knowing some of their circumstances from personal experience, a Marquette lawyer of more than a century ago blazed a trail in providing legal help to professional athletes.

By Thomas G. Cannon

Today, it is commonplace for top athletes to rely on a phalanx of lawyers, agents, accountants, investment advisors, and public relations consultants to help manage their careers. A century ago, such professional resources were unheard of for poorly paid athletes—unless one retained Milwaukee lawyer Ray Cannon, a Marquette University law alumnus (class of 1913) and pioneering figure in sports law.

The spark behind his role lay in Cannon's considerable ability as a baseball player. He began making a name for himself "up North"—in Minocqua, Wisconsin—as a gifted right-handed pitcher for his city team. In 1910, Cannon moved to Milwaukee to begin the three-year law program at Marquette University. By then, he had perfected his curveball and changeup to earn \$50 a game pitching for semiprofessional teams in the Wisconsin-Illinois League. Income from those weekend gigs subsidized his legal education.

Cannon soon faced a pivotal career choice: baseball or law? He turned down contract offers from two teams in the American Association: the St. Paul Saints and the Toledo Mud Hens. Milwaukee attorney Henry Killilea, a family friend and father figure to the orphaned Cannon, offered a clerkship in his law firm. That step proved providential, as Killilea also owned the Milwaukee Brewers baseball team. In fact, in 1899, at the old Republican House Hotel in downtown Milwaukee, Killilea convened a meeting of Connie Mack, Charles Comiskey, and Ban Johnson to found the American League.

Cannon's stint in the Killilea firm taught him that sports and law could make a successful match. But where Killilea represented ownership interests, Cannon's natural sympathies as a player led him to side with the stars who actually drew the crowds that generated franchise income. Part of his legal career would come to focus on representing athletes' interests.

Even after becoming a practicing lawyer, though, Cannon arranged his busy trial schedule so that he could pitch spring training games for major league teams. He parlayed friendships with managers Kid Gleason, Art Fletcher, and Joe McCarthy to pitch for the Chicago White Sox, Philadelphia Phillies, and Chicago Cubs. In spring of 1918, for example, he threw a three-hitter for the Phillies against the Boston Braves. His last such game came in 1924, when he pitched the Phillies to a 6–2 victory over the Braves in Miami. Lou Chapman, longtime *Milwaukee Sentinel* sports editor, would later write, "Ray Cannon . . . was as skillful in the pitcher's box as he was before a jury and could have made a profession of baseball had he wished."



Attorney Ray Cannon (left) sits next to his client, Jack Dempsey, in 1921, at Dempsey's training camp in Atlantic City, N.J., where the world heavyweight champion was preparing for his successful title bout with Georges Carpentier; standing is trainer Teddy Hayes.

Jack Dempsey

In February 1918, a promising young boxer named Jack Dempsey arrived in Milwaukee to fight the heavily favored Bill Brennan at the Milwaukee Auditorium. Before the match, however, Dempsey's unscrupulous ex-manager, John "the Barber" Reisler, slapped a restraining order on Dempsey, escrowing a one-third share of his purse. The pugilist needed legal counsel fast. Local boxers at the old Elite Rink on National Avenue (where Dempsey was training) urged him to hire a courtroom fighter named Ray Cannon.

Reisler's Milwaukee suit was one of many he filed in courthouses around the country, thus placing Dempsey's future under a legal cloud. The

most damaging consequence of his managerial uncertainty was that it blocked Dempsey from scheduling the quality opponents necessary to contend for the championship. Cannon got Reisler's restraining order lifted and soon won dismissal of the underlying suit. His pivotal representation cleared Dempsey's path to a coveted title bout. Recognizing the significance of that case, the Milwaukee County Historical Society mounted a major exhibit on the litigation in 1997.

Before a crowd of 70,000 fans in Toledo in 1919, Dempsey won the heavyweight crown, knocking out reigning champ Jess Willard in three rounds. Dempsey quickly became, in the words of biographer Paul Gallico, "the greatest and most beloved sports hero the country had ever known." In the 1920s, Dempsey eclipsed Babe Ruth in national and international acclaim.

Cannon continued representing the champ over the next eight years. In 1921, he negotiated the contract for the Dempsey-Carpentier fight before 91,000 fans at Boyle's Thirty Acres in New Jersey. The bout marked a milestone in sports history by producing the first million-dollar gate. For that single match alone, Dempsey's take was more than \$300,000, far eclipsing Ruth's 154-game salary of \$70,000.

Cannon recognized that Dempsey might realize additional income by syndicating film rights to his bouts, but a federal law banned interstate shipment of fight films. In 1921, the Milwaukee lawyer sought a test case to challenge the statute, publicly announcing that he would deposit a film of the second Dempsey-Brennan match in a mailbox outside the federal courthouse in Chicago. The U.S. Attorney's office, not wanting to indict the world's most popular athlete, declined the bait.

The champ's contract with Cannon described him as Dempsey's "legal and business advisor." A contemporaneous newspaper described his role: "The Milwaukee attorney is on the ground for all of Dempsey's big battles and takes care of the legal end of the bout, and for any other difficulties that may arise." The Milwaukee lawyer also worked out with the champ during training camps.

Dempsey proved to be an entrée for Cannon to acquire such boxing clients as Freddie Welsh, world lightweight champion; Ad Wolgast, former world lightweight champion; and Jimmy Wilde, world flyweight champion. Yet none of them approached Dempsey's fame or occasioned as much attention for Cannon from newspapers around the country.

The champ and his attorney remained close friends. On one Milwaukee visit, Dempsey even babysat the three Cannon children. Of his lawyer, Dempsey said, “Ray’s been my friend for years. He’s squared me in a lot of legal jams, has exceptional ability, and is honest to a fault. Also, I have found his advice has always been sound. I wish I had always followed it.”

National Baseball Players Association

Ray Cannon saw professional sports through the lens of his baseball-playing experience. His *bête noir* was the infamous 10-day reserve clause that owners required in all major league contracts. On that, Cannon argued: “A ballplayer may sign a five-year contract, say, at \$4,000 a year. He may develop into a sensation and be a tremendous box-office draw. But his salary is set. He takes it all for five years, or he’s through. On the other hand, he may break a leg sliding into a base—but the club is not bound in any way. Ten days later, he can be released without further pay!”

That provision reflected the players’ lack of economic leverage vis-à-vis club owners, as well as their weak legal position resulting from a recently decided U.S. Supreme Court case, *Federal Baseball Club v. National League* (1922), which excluded baseball from the application of the Sherman Antitrust Act of 1890.

To address the imbalance, in August 1922, Cannon formed a labor union, the National Baseball Players Association. As he told the *Boston Globe* at the time: “The players at present are little better than slaves of the owners, subject to arbitrary direction and dismissal. The only possible way in which a just, honest, and fair contract can be secured from the owners is for players to organize as a unit.”

Within months, 132 players in the National League and 93 in the American League signed membership pledges. Samuel Gompers, president of the American Federation of Labor, endorsed the union. However, nationally syndicated columnist Westbrook Pegler called Cannon a “labor agitator” and described him as “the Leon Trotsky of the sporting business.” A *New York Times* editorial, dripping with sarcasm, declared: “It is probable that the liberal weeklies and other champions of the downtrodden will hail with joy this banding together of the oppressed slaves of capital,” but the *Times* had no sympathy.

In that early-1920s era, before passage of the National Labor Relations Act more than a decade

later, the owners quickly crushed the nascent union by threatening to blacklist any player who joined. Before its disbanding the following year, though, Cannon was able to extract one long-lasting concession: creation of a relief fund for needy former players, which still exists today. He later explained: “We were successful enough to make the magnates come down off their high horses and meet some player demands, but their quick rush to an agreement broke up our union. They came to terms on the condition players quit the union.”

Cannon’s stature among ballplayers soared because they appreciated his going to bat for them. When he brought his nine-year-old son to the 1926 World Series, the Cannons visited both team dugouts during batting practice. Grover Cleveland Alexander introduced the boy to the St. Louis Cardinals and gave the youngster a diamond pin worth \$300. Babe Ruth introduced the boy to Lou Gehrig and other stars of the New York Yankees.

Cannon continued representing individual ballplayers with grievances. In 1924, for example, he advised Washington Senators outfielder Wid Matthews on contract issues. Matthews had an unremarkable playing career but later achieved renown as a footnote to a more famous story. Working as a scout for the Brooklyn Dodgers in 1946, Matthews wrote a glowing assessment of a recently discharged World War II army veteran who hoped to break into the major leagues. That report influenced Branch Rickey to interview, and then sign, an unheralded infielder named Jackie Robinson, thereby ending Major League Baseball’s ban, in effect since 1888, on African American players.

Black Sox Trial

The greatest scandal in American sports history occurred in 1919 when eight Chicago White Sox players were accused of accepting money from gamblers to throw the World Series. The episode occasioned two legal cases.

In the first proceeding, players were hauled before a Cook County grand jury and encouraged to admit to crimes by team counsel Alfred Austrian. Relying on that conflicted advice, the players testified and were quickly indicted. Before trial, however, the “confessions” were stolen from the evidence room in the prosecutor’s office. The players, thereafter represented by independent lawyers, declined to testify at trial. (Ray Cannon made a cameo appearance at the trial, successfully

Cannon’s stature among ballplayers soared because they appreciated his going to bat for them. When he brought his nine-year-old son to the 1926 World Series . . . , Babe Ruth introduced the boy to Lou Gehrig and other stars



Charles “Swede” Risberg (left) and Oscar “Hap” Felsch (right), members of the 1919 Chicago White Sox, confer with attorney Ray Cannon in July 1921 during their trial in the old Cook County Criminal Court Building, at 54 W. Hubbard Street in Chicago.

obtaining permission to allow Oscar “Happy” Felsch to return briefly to Milwaukee for his father’s funeral.) The jury acquitted all defendants.

Nonetheless, White Sox owner Charles Comiskey fired the players, and Commissioner Kenesaw Mountain Landis (a onetime lecturer at Marquette University’s law school during his earlier tenure as a federal judge) banned them from baseball for life. Newspapers dubbed them the “Black Sox.”

Best known in the group was “Shoeless Joe” Jackson. The star leftfielder had a .356 lifetime batting average, ranking him third all-time behind Ty Cobb and Rogers Hornsby. Babe Ruth called Jackson “the greatest natural hitter I ever saw,” and paid him the ultimate compliment by copying Jackson’s swing. At the urging of teammate (and Milwaukee native) “Hap” Felsch, Jackson sought Ray Cannon’s help in recovering two years of back salary and his share of the 1919 World Series bonus.

Cannon filed suit in Milwaukee County because Comiskey had incorporated his club in Wisconsin when he helped charter the American League. In a pretrial letter, Cannon told Jackson, “I want to trim Comiskey if it is the last thing I do.” Cannon’s cross-examination of the White Sox owner, in early 1924, proved to be the trial’s dramatic highlight. As set out in Eliot Asinof’s book, *Eight Men Out*, Comiskey admitted that baseball’s reserve clause was unfair to players, but he claimed that Jackson broke his contract by selling out to gamblers.

Cannon sharply reminded Comiskey that the law had tried and acquitted Jackson. Suddenly, Comiskey’s lawyer pulled from his briefcase the stolen grand jury transcript of Jackson’s “confession”—missing since 1920. Cannon immediately demanded to know how Comiskey came into possession of confidential grand jury materials. Neither the witness nor his lawyer could

answer the question without self-incrimination since both state and federal law made receipt of stolen property a felony.

A reporter for the *Milwaukee Sentinel* described Cannon’s final argument as “powerful,” adding: “Cannon wept in closing his pleading for Jackson, whom he described as one of fifteen children, obliged at 12 years of age to enter the unhealthy cotton mills of South Carolina to help feed his brothers and sisters, and begged the jury to restore him to his honor, even if they didn’t give him any money, so that he can go back home and again look his neighbors in the eye and tell the world that he had been falsely accused.”

Jurors returned a verdict awarding Jackson his full back pay and World Series share. Judge John Gregory then surprised observers by setting aside the verdict, ruling that Jackson’s trial testimony conflicted with his grand jury testimony. Inexplicably, the jurist overlooked Comiskey’s chicanery in using stolen documents.

In 1988, the Chicago Historical Society acquired Jackson’s grand jury transcript from Comiskey’s old law firm. The purloined document revealed that Jackson had denied throwing the World Series and gave testimony that was equivocal, if not exculpatory, on several key points.

Asinof and other baseball historians eventually ferreted out the truth behind Cannon’s trial question to Comiskey and his lawyer: the White Sox owner had paid a rumored \$10,000 to gambler Arnold Rothstein to steal the grand jury documents. Thus they were available to Comiskey for use in the Milwaukee trial, several years later, in 1924.

Afterward, Cannon rendered his own private verdict on the Black Sox, telling his son: “If any of the players was innocent, it was Jackson.” That conclusion was borne out by Shoeless Joe’s on-field performance. Jackson set a World Series record by batting .375 (12 hits, including a home run, three doubles, and six RBIs). In eight games, Shoeless Joe played 72 flawless innings devoid of a single fielding or throwing error.

Trial testimony established that Jackson did not conspire with teammates to throw the Series and that he made a good-faith effort to report what he’d heard to Comiskey (who refused to see him). The 1,700-page trial transcript remains the only complete firsthand account of the Black Sox scandal—told in the words of its principals, under oath, and subject to cross-examination. More than a dozen books and two movies have kept the Black Sox in the limelight

as partisans of one side or another continue to debate the scandal, but the jury's verdict stands as the only call of a truly objective umpire.

Cannon later settled Jackson's case, along with those of "Hap" Felsch and Charles "Swede" Risberg, during appeal. In 1927, the Milwaukee lawyer represented Risberg in an unsuccessful reinstatement hearing before Commissioner Landis. In 1951, shortly before both men's deaths, Cannon sent Shoeless Joe a note of encouragement after the South Carolina Legislature adopted a futile resolution urging Jackson's reinstatement in baseball.

Red Grange

Harold "Red" Grange, often regarded as the top college football player of all time, became the first superstar in the newly formed National Football League. Turning professional after the 1925 collegiate season, Grange traveled to Wisconsin to consult Ray Cannon about his managerial situation. In a reprise of the Dempsey case, the "Galloping Ghost" found himself pursued by a high-flying manager, C.C. ("Cash and Carry") Pyle. Grange ignored Cannon's advice to avoid hiring Pyle and signed with the smooth talker.

The results were disastrous. After back-to-back college and pro seasons, Grange also barnstormed an additional nine games in 40 grueling days. As his injuries mounted, his performance plummeted, and for the first time in his life crowds booed the star. When financial results fell far short of the million dollars dangled by Pyle, Grange refused renewal of his manager's contract. The episode, though, highlighted the risky mix of unsophisticated athletes and unscrupulous managers vying for the increasingly large sums pouring into professional sports.

Baseball and Congress

In 1933, one last pitching assignment beckoned Ray Cannon, then a freshman member of Congress representing a Milwaukee district. He took the mound at the home of the Washington Senators—Griffith Stadium, known as a pitcher's park—to hurl for the Democrats in the annual congressional baseball game against Republicans. Celebrity umpires for the contest, which raised money for charity, were General John J. Pershing, former heavyweight champion Gene Tunney (in a bit of irony, perhaps, given his famous rivalry with Jack Dempsey, Cannon's former client), and singer and comedian Al Jolson. Cannon was now age 42, and the final score, 18–16 in favor of the GOP, showed that his arm was finished.

In 1937, as chairman of the House Committee on Revision of the Laws, Congressman Cannon wrote Attorney General Homer Cummings, demanding the Justice Department investigate and prosecute major league owners for antitrust violations arising from their continuing use of the reserve clause.

Cummings ultimately declined, saying that he was blocked by the Supreme Court's *Federal Baseball* decision. That opinion, written by Justice Oliver Wendell Holmes, Jr., would become one of the Court's most widely panned. The Court ruled that Major League Baseball was not engaged in interstate commerce and therefore lay beyond the reach of federal antitrust law.

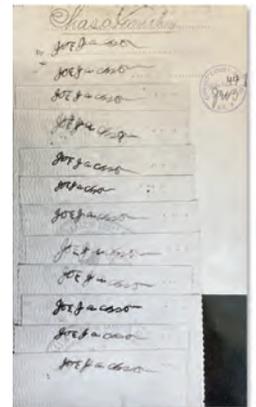
Cannon pressed two points: (i) *Federal Baseball* was a narrow, intercorporate ruling that failed to consider, much less adjudicate, owners' unlawful collusion against players; and (ii) the Supreme Court's recent decision (*NLRB v. Jones & Laughlin Steel Corp.*), upholding the National Labor Relations Act in 1937, implicitly overruled *Federal Baseball*.

Within days of the attorney general's declination, Cannon introduced a bill to strip baseball of its antitrust exclusion. The measure failed, but Cannon's legislative remedy anticipated a future Supreme Court opinion, *Flood v. Kuhn* (1972), declaring that only Congress could revoke baseball's unique legal status with respect to the antitrust laws. After a century, *Federal Baseball* remains the law of the land. Meanwhile, the National Football League, National Basketball Association, and National Hockey League are subject to federal antitrust law precisely because they operate in interstate commerce.

Conclusion

Ray Cannon emerged as a national figure on the cusp of the 1920s, America's first golden age of sports. His advocacy addressed the corrupting influence of commercialization, the economic injustice of refusing to share equitably the industry's largesse with its workers, and the perils of mass celebrity. By advancing legal remedies he first studied at Marquette University Law School, Cannon cemented his pioneering position in the niche known today as sports law. ■

Thomas G. Cannon is a former professor at Marquette University Law School. Ray Cannon was his grandfather.



This is an image of defendant's exhibit no. 44 in "Shoeless Joe" Jackson's 1922 Milwaukee County Circuit Court trial against Charles A. Comiskey, owner of the Chicago White Sox. The multiple signatures by Jackson are handwriting exemplars—likely, variously either culled from documents that he signed or provided to handwriting examiners such as John F. Tyrrell, who prepared this exhibit. (Comiskey's name at the top is not his signature but simply means that the exhibit was proffered by him as defendant.) An autographed photograph of Jackson sold this fall for \$1.47 million.

Ray Cannon, newly elected member of Congress, in 1933.





Unpredictable and Stormy, with Some Hope for Improvement

FOUR MARQUETTE EXPERTS ASSESS THE TUMULTUOUS CHANGES UNDERWAY IN COLLEGE SPORTS.

To paraphrase song lyrics from 1967, there are a lot of things happening here, but what they are ain't exactly clear. The overall structures of college sports and the rules and rights for athletes are among facets of the sports landscape being challenged and revised.

To gain some clarity, we invited four experts from Marquette University to talk about current developments and what might lie ahead. The four were **Paul M. Anderson**, director of the Law School's National Sports Law Institute (NSLI); **Vada Waters Lindsey**, professor of law and a member of the NSLI Board of Advisors; **Matt Mitten**, professor of law and executive director of the NSLI; and **Bill Scholl**, Marquette University's director of athletics and vice president. This is an edited transcript of the conversation, which was moderated by **Alan J. Borsuk**, editor of *Marquette Lawyer*.

Q. How stable are collegiate sports these days?

SCHOLL: There are short-term and long-term aspects of this. In the long term, will college athletics, intercollegiate athletics, continue to exist? That would be a resounding "Yes" from my perspective. Not that things couldn't get really ugly and perhaps go a different direction. But as we sit here today, I would say, in the long term, we will get through the instability and the changes we are seeing today and, in my mind, hopefully have a healthier intercollegiate athletics landscape in 5 or 10 years. Certainly there is a ton of instability right now. I've been in the business more than 30 years, and while I've seen some significant changes occur, I've never seen so many at one time. I think that is causing a lot of insecurity for all of us.

For example, there are the new rules that allow athletes to benefit financially from "NIL"—the use of their name, image, and likeness. I'm very comfortable with our student athletes being able to use their name, image, and

likeness to help themselves. I think that's fine. I think it will be important to have guardrails placed around it. Will there be a patchwork solution long term, or can we get some national solution? NIL opportunities are already being used in the recruiting wars.

Q. Will NIL help the big-revenue sports and hurt the sports that do not generate much revenue?

MITTEN: There's only so much sponsorship revenue out there. Until now, the National Collegiate Athletic Association (NCAA), conferences, and schools have shared the entire pie. Now it's going to be shared with student athletes. That's not a bad thing, certainly. In fact, I think U.S. colleges and universities are going to be the primary training ground for Olympic sport athletes from all countries throughout the world. One beneficial thing is that you'll probably see more student athletes stay in school and get their degree. Everyone thinks they're ready for the NBA or the NFL, but they really should get their degree before they move on.

Here's the bigger issue I see: the effect this is going to have on high school sports. Even though I'm a Buckeye (from my undergraduate days), I did not like the number-one football recruit's decision to skip his senior high school season of football, in Texas, to enroll at Ohio State. He probably won't play much this year, but he already has a \$1.4 million endorsement deal to sign autographs, a \$100,000 truck, and more. I do not want to see college or high school sports be professionalized. There is clearly a difference between the two, and that is the academic component, among other things.

LINDSEY: You look at some of the numbers that Matt threw out, and you see there are significant tax considerations. In terms of the knowledge, the instability, these students are very young athletes who are coming into the universities, and

now they will have to be educated about the tax considerations. There are issues around self-employment taxes, principal place of employment, and more. I think it is very complicated. I hope these athletes are going to get the necessary advice and counsel.

ANDERSON: We're very early into the NIL situation. In a couple of years, it's going to self-correct. We can't keep having sponsors throw money like they are now, without a return. Eventually, not every football player who goes to Ohio State is going to get a great deal. I think we're at this flashpoint where there is money and there are people for the first time. But I wonder what happens when it gets down to the Marquettes, the smaller schools that may not have that many athletes who would have that value. What does that mean? Does it mean they don't come to Marquette? I doubt that, but it could.

Suni Lee, the Olympic gold medal gymnast, and several other gymnasts will make a lot of money while going to college. But that's five athletes who might go to college and get NIL rights. This is not benefiting a lot of Olympic athletes. There aren't many that are perceived as worthy of someone's paying that kind of money for them. Maybe that will change. But this is predominantly about football and basketball players so far. That will create an inequity.

Does it create an inequity that is a Title IX issue, strictly speaking? Probably not. But does it create an inequity that the women are not getting what maybe the men have access to, and will there be a demand on universities that you've got to help the women, too, in the way you're not needing to help the men?

Another big flaw with all of this is that I think universities are left out in the middle of nowhere. I think people have the perception that athletes are against their athletic departments, and I have never seen that. I think athletes are dependent on their athletic departments. NIL is almost a point where athletes



Paul M. Anderson



Vada Waters Lindsey



Matt Mitten



Bill Scholl

can't go to the athletic department for all the help they need. It's almost set up in a way that it's not something the athletic department should be dealing with, in many ways. You mention finding someone who can help them with tax issues. I don't know where they're going to go. Unfortunately, the people they will find, the people who are advertising, are not experts and are not people they should be talking to. This system was set up so fast and is so unregulated at this point—that's my concern. Unfortunately, I know so many universities that are struggling to help their athletes when they actually can't help their athletes in many ways.

Q. On June 21, 2021, in a case known as *NCAA v. Alston*, the U.S. Supreme Court ruled unanimously that NCAA rules violated federal antitrust law by capping the education-related benefits universities could provide to college athletes. The Court accepted antitrust arguments related to the NCAA that it had not endorsed previously. Justice Brett M. Kavanaugh issued a concurring opinion, strongly suggesting that other NCAA rules also violate antitrust law. How important is *Alston*?

ANDERSON: I've seen *Alston* cited in a lot of cases already. Judges are seeming to take it out of the antitrust realm a lot. Will they make decisions based on that? I'm not so sure. Some judges seem to think *Alston* said that athletes are not amateurs. *Alston* has become the way for some to say, "NCAA, you can't do anything." It's not true, but some people are interpreting it that way. Too many people are taking the *Alston* decision as if the concurrence were the decision, when only one justice wrote that and no one else explicitly agreed to it.

MITTEN: Even though *Alston* is a very narrow decision on its face, its broad implications significantly limit the NCAA's historical authority and ability to regulate college sports. For example, two antitrust suits were filed against the NCAA immediately after an internal



Paul Anderson with his bobblehead collection

working group proposed that college athletes be allowed to earn NIL income. The holding in *Alston* that the full three-step "rule of reason" applies—including whether there is a less restrictive means of achieving procompetitive NCAA objectives such as maintaining competitive balance in college sports and distinguishing them from professional sports—creates legal uncertainty regarding the result of these cases and future antitrust litigation. NCAA President Mark Emmert has called for a convention to restructure NCAA governance. And will Congress get involved by providing limited antitrust immunity?

SCHOLL: It has made all of us tentative, hesitant. This idea of a balanced competitive field is something we have always bought into, although there are those who would say it has never really been true. You look at the NCAA rule book. It's ridiculously thick, Bible thick. Every rule that is in there is because somebody did something to ostensibly gain an advantage. For most of them, the advantage gained was probably not that large. So we've handcuffed ourselves with all of these rules, and now they are all under attack.

MITTEN: In my opinion, university presidents and athletics administrators are in the best position to regulate intercollegiate athletics, not courts applying antitrust law on a case-by-case basis. *Alston* has seriously called into question the legality of their collective

authority to govern college sports. It's just total unpredictability at this point, and there is very significant risk of antitrust liability, so there's going to be paralysis. As a result, I think there will be many future negative unintended consequences, which Congress or anyone else may be unable to effectively correct.

Q. What is the health of the separation between amateur college athletes and professional athletes?

MITTEN: *Alston* creates significant doubt regarding the authority of the NCAA (or even two major conferences) to internally govern college sports because virtually every student-athlete eligibility rule, including academic requirements, limits economic competition among its member schools for their playing services. Of course, the essence of sports is that you need uniform rules applicable to all participants. Going forward, it will be very difficult for the NCAA and its conferences and schools to defend their rules from antitrust attack, which poses the danger that the predominantly good features of college sports will be judicially invalidated along with its relatively few bad components. Antitrust law should not be used to transform college sports into minor league professional sports.

LINDSEY: In my tax class, we discussed gifts, and it seems that some of these college athletes receive gifts from various individuals. If I see a

student athlete with a really nice car, I'm wondering, "Where did that car come from?" There may be potential income tax consequences when someone receives a so-called gift because it may not be treated as a gift for income tax purposes. I wonder how many of these amateurs really understand that.

Q. Are Marquette athletes still amateurs?

SCHOLL: I sure hope they're amateurs. And they do have to register their cars with us, so we at least have some sense of what they're driving and how they came to have paid for it. Is there cheating in our industry? Absolutely. Certainly not at Marquette that I'm aware of, obviously. And this isn't going to fix cheating. NIL is not going to fix it. If there's an arrangement where someone is getting a car and not doing anything for it, that's not going to go away just because there is NIL.

Q. We're coming up on the fiftieth anniversary of Title IX, the federal law that generally says that educational opportunities, including in sports, have to be comparable for men and women. How do things stand now when it comes to Title IX?

ANDERSON: Title IX only works if the student athlete or athletes involved bring a lawsuit or go to the government and say there is a problem here. It is not self-fixing. There is no enforcement mechanism unless you force it. I can look at virtually any high school or college and say, just from the outside, you have a Title IX issue here—it's meaningless, though, unless a student athlete brings a claim of some sort. Title IX has had a lot of impact. But at the high school level, the number of boys playing sports in 1972 is still more than the number of girls playing sports in 2020. Has it had an impact? Sure, because girls were starting at zero basically. But has it had an impact that there's some sort of level of equality? Not remotely.

Q. As a fan and observer who casually follows sports, what should I be keeping an eye on when it comes to all of these legal issues?

SCHOLL: The major conference realignments that are being considered could certainly change the landscape, particularly for somebody like Marquette, combined with whether or not football and/or anyone else goes off and creates its own governance structure. I certainly think it's possible that football will be handled outside of whatever new governance structure emerges from changes in the NCAA. The question for us is, obviously, those schools that play high-level football, what are they doing with their basketball programs and all of their other programs? Are they going to compete in two worlds, one of which is the traditional Division I world but another world for football?

For us at Marquette, the single most important thing to keep an eye on is access to the NCAA basketball tournament. That drives so much of what we do, in terms of revenue and who we are as an athletics department. The NCAA constitutional convention is going to be critical. As a fan, that's what I would be following. As an athletic director, that's what I'm following.

LINDSEY: One of the concerns that I have is just making sure that athletes are safe. We've talked about Title IX and things like sexual harassment and some of the abuses that have taken place. I just want collegiate athletes, particularly female athletes, to feel safe and secure when they are on these campuses and traveling to different cities in furthering their commitment to their sport.

MITTEN: Antitrust law is designed to promote consumer welfare, so hopefully lower courts don't interpret *Alston* to invalidate all aspects of the amateur/academic model of college sports, which has resulted in a unique brand of very popular athletic competition. College sports have never been so popular, and fans haven't brought any

antitrust litigation challenging any NCAA amateurism rules. It will be interesting to see *Alston's* effects on the NCAA basketball tournament. Hopefully, judicially mandated less restrictive alternatives to current NCAA rules won't result in all the best college athletes going to only the traditional power schools, which would deprive fans of seeing exciting games in which Number 12 seeds knock off Number 5 seeds.

Tax law also is very important because the IRS has always said athletic scholarships are not subject to federal income tax. Once you start moving college sports toward a more professional model, the IRS might change its mind on that. If so, college athletes will be worse off economically.

ANDERSON: My advice is to stop expecting that the law, lawyers, and judges will actually do anything helpful in collegiate athletics. To me, the main thing is to look at the student athletes. Most people who become student athletes get wonderful educations, and use their education to build their futures. Some of my best law students have been student athletes. Their experience trains them well. The more that we create these things that separate sports from the educational system, the more we devalue sports.

I hope that whatever the NCAA does, the student athlete is still at the forefront. I know it is for athletic departments. I'm not so sure when I see all of these lawsuits and the judges who don't really understand exactly how things work. If we focus on the student athletes, I think we'll be fine. I think college sports will continue in a wonderful way. Things will change. Things seem to change every year. But we can adjust to that as long as we keep the individual athletes in mind.

SCHOLL: We've survived a lot, and we'll continue to survive a lot. We've got to be laser focused on the experiences of student athletes at our institutions. If somehow we can fight through all the politics and keep that in place, we'll be just fine. ■



Lakefront and the Public Trust Doctrine

BY JOSEPH D. KEARNEY AND THOMAS W. MERRILL

This past May, Cornell University Press published *Lakefront: Public Trust and Private Rights in Chicago*, written by Joseph D. Kearney, dean and professor of law at Marquette University, and Thomas W. Merrill, Charles Evans Hughes Professor of Law at Columbia University. The product of more than 20 years of research, much of it greatly assisted by Marquette law students, *Lakefront* explores a number of questions important not only to Chicago history but also to property law and urban planning in the United States more generally.

This summer, Dean Kearney and Professor Merrill were invited by a set of national blogs to expound—and, ideally, expand—upon the themes of *Lakefront*. They posted three sets of original blog posts (not simply excerpts from the book). In reverse chronological order: The five entries in August, on *PrawfsBlawg*, explored the role of *possession* in property law, and the five-part series on *The Faculty Lounge*, in July, considered the implications of *Lakefront*'s cases and chronicles for the law of *standing to enforce public rights*. The first five-part series, published at *The Volokh Conspiracy* in June, focused on the *public trust doctrine*.

The public trust doctrine, while often said to have ancient roots, first sprang into view (if you will) in American law on the Chicago lakefront, in the form of an 1892 decision by the U.S. Supreme Court. The doctrine is a matter of broad interest in environmental law today. We present here, lightly edited, Kearney and Merrill's guest posts at *The Volokh Conspiracy*.

1. The Origins of the American Public Trust Doctrine

A new book begins by explaining the real origin story of the American public trust doctrine.

Resources in the United States are generally held as private property, which gives the owner the right to exclude others. There is one glaring anomaly: certain resources are subject to a “public trust,” prohibiting the authorization of private exclusion rights. Where did this doctrine come from, and how has it played out over time? We explore this issue in depth in our new book, *Lakefront: Public Trust and Private Rights in Chicago* (Cornell University Press). We are most grateful for the opportunity, as guest bloggers, to present some highlights from the book or reflections based on it.

The public trust doctrine's conventional origin story goes something like this: In 1869, a corrupt Illinois

legislature granted 1,000 acres of submerged land in Lake Michigan, east of downtown Chicago, to the Illinois Central Railroad, including the right to build a new outer harbor in the lake. Four years later, a new legislature, voted in by an outraged citizenry in the midst of the Granger Movement, repealed this “Lake Front Steal.” The U.S. Supreme Court, in the landmark *Illinois Central Railroad Co. v. Illinois* decision in 1892, upheld the repeal, on the ground that the submerged land under a body of navigable water is held in trust for all the people, to ensure they always and forever have access to such waters.

The Court's decision became a model for various states to recognize this “trust” in certain resources that are “inherently public” (Professor Carol Rose's helpful term from 1986). The doctrine functions as a kind of anti-privatization rule: although most resources are subject to a

The U.S. Supreme Court, in the landmark *Illinois Central Railroad Co. v. Illinois* decision in 1892, upheld the repeal [of the 1869 Lake Front Act], on the ground that the submerged land under a body of navigable water is held in trust for all the people, to ensure they always and forever have access to such waters.

right to exclude, public trust resources come with an *inalienable* right of the general public *not* to be excluded. Unsurprisingly, the public trust doctrine has become a favorite of environmentalists and other activists who would like to see public control extended over a variety of resources, ranging from wilderness areas to wildlife, cyberspace, and the climate or atmosphere itself.

Lakefront's in-depth research into the origin story and the monumental 1892 decision reveals a number of surprising points. One is that the Illinois Central's 1869 manipulation of the state legislature was triggered by a change in the law: a most surprising 180-degree turn in property rights. Up to about 1860, the conventional view, following the common law of England, had been that the bed of Lake Michigan, like other submerged land in Illinois, was owned by whoever happened to be the riparian owner of the land bordering the water.

After 1860, the view shifted—not yet authoritatively but perceptibly—toward the State of Illinois as the owner of the bed of Lake Michigan. Since the state at that time had no capacity to develop this newly discovered right, a variety of machinations broke out to secure a grant from the legislature, transferring the rights to some private or local-government group. This was deeply threatening to the Illinois Central, which over a decade and a half (beginning in 1852) had made very significant investments in railroad and terminal facilities on landfill in the lake. So, having survived threats in the 1867 legislative session, the railroad in 1869 basically outthrust, with some bribery likely involved, rival groups to secure a grant of the land for itself. The railroad's motivation, in other words, was largely *defensive*.

A second point concerns the odd fact that nearly 20 years passed between the repeal of the grant to the railroad (1873) and the Supreme Court decision upholding the repeal under the public trust doctrine—and even a decade between the repeal and the beginning of the lawsuit in 1883. The basic reason for this was that the Illinois Central had been convinced by its lawyers that the repeal was unconstitutional. After all, the Supreme Court had held in *Fletcher v. Peck* in 1810 that a completed grant of land by a state legislature is protected against repeal by the Contract Clause of the Constitution—even in the face of plausible allegations that the original

grant was corrupt. The Court in its post-Civil War incarnation had reaffirmed this principle of vested rights. So the Illinois Central refused to compromise with the city of Chicago over whether the railroad had the right to construct an outer harbor protecting (and augmenting) its facilities along the lakefront.

When the issue finally reached the Supreme Court, the vote was close: 4 to 3. There were two recusals, one by a stockholder in the railroad (Justice Samuel M. Blatchford) and the other by Chief Justice Melville W. Fuller, who had represented the city against the railroad in the lower court—and who, apparently unbeknownst to all save (presumably) him, had been a principal in one of the earlier (1867) schemes to obtain a grant of the submerged land for a group of private investors. The dissenters, led by the newly appointed Justice George Shiras, Jr., agreed with the railroad that the repeal was unconstitutional under established doctrine.

The majority opinion, by senior-most Justice Stephen J. Field, adopted the public trust idea, *scarcely mentioned or developed in the litigation*, and construed it as a principle embedded in the state's title—you will recall this title to have been only recently and not yet authoritatively recognized—to the land under Lake Michigan. Field's opinion resonates with his Jacksonian-Democrat suspicion of government grants creating monopoly franchises—hence the language in the opinion disapproving of the grant to a corporation favored by other generous government land grants and created for purposes other than constructing a harbor.

To obtain a fourth vote, Field needed Justice John Marshall Harlan, who had decided the case as circuit justice in the court below on the theory that the grant could be construed as conveying only a revocable license. Accordingly (we conjecture), Field tossed in a long paragraph describing the Harlan theory, without expressly endorsing it.

In short, by the narrowest possible margin, the public trust doctrine joined the police power as an exception to the vested-rights principle of the Contract Clause. The accumulating exceptions would contribute to the gradual demise of the once-powerful Contract Clause and the rise of substantive due process during the same era. Very soon after the *Illinois Central* decision (in *Shively v. Bowlby* in 1894), the Court decided that the public trust doctrine was a matter of state law,

Major Areas Along the Chicago Lakefront

not federal constitutional law. So the doctrine gradually developed a number of variations in different states, which limited its visibility, but also opened it up to a variety of creative extensions.

Our next post will explore some of the ambiguities that emerged with the original public trust doctrine—for example, who the trustee is, who has standing to enforce it, and what resources are covered by the trust.

2. The Confoundments of the Public Trust Doctrine

Basic questions presented by the public trust doctrine have made the judicial process challenging.

The American public trust doctrine—a kind of anti-privatization rule for certain kinds of resources—made its spectacular debut in the *Illinois Central* decision of 1892, as we described in our initial entry. The stakes in the case were high: the question was whether the submerged land in Lake Michigan, just east of downtown Chicago, would be given over to a rail and harbor complex, to be owned by a private railroad, or would be kept forever open to the general public. The decision was by the most prominent of tribunals—the Supreme Court of the United States. And the rhetoric of Justice Stephen J. Field's majority opinion, speaking of navigable waters and the land beneath them as belonging to the state “in trust” for the public, was stirring.

Unsurprisingly, the decision spawned a significant body of cases in Illinois and in many other states. Our new book, *Lakefront: Public Trust and Private Rights in Chicago* (Cornell University Press), allows us to probe more deeply into what kind of “trust” was created by this doctrine, when viewed as a species of trust law more generally. While we use the Chicago lakefront, or Illinois, as an extended case study, the issues explored are important wherever the public trust doctrine can be found. This second of five entries suggests some questions inherent in the doctrine and perhaps inimical to its development.

Here is one question of obvious importance: who is the trustee? The Supreme Court did not specifically address the question in *Illinois Central*, except insofar as it implicitly regarded itself as the trustee. The issue soon arose explicitly in a case called *People ex rel. Moloney v. Kirk* (1896), where the question was whether the state



This map, prepared by Chicago CartoGraphics, is Figure 0.2 in *Lakefront: Public Trust and Private Rights in Chicago* (Cornell University Press 2021). It shows the lakefront's various areas, many of which have been the subject of public trust controversies and cases since the U.S. Supreme Court's decision in the *Illinois Central* case in 1892. The book also addresses the public dedication doctrine, used by Aaron Montgomery Ward and others to keep buildings off the downtown lakefront, and the use of boundary-line agreements as an innovative device to enable cash-strapped park districts in the 20th century to obtain riparian rights necessary to build Chicago's lakefront parks and the now-renamed DuSable Lake Shore Drive. *Lakefront* includes 90 figures, such as plats, maps variously historical or original, architectural renderings, and photographs.

The doctrine functions as a kind of anti-privatization rule: although most resources are subject to a right to exclude, public trust resources come with an inalienable right of the general public not to be excluded.

could transfer submerged land to a park district, on the understanding that the park district would then sell some of the land to fund a segment of Chicago's Lake Shore Drive.

The Illinois Supreme Court held in *Kirk* that the state legislature was the trustee of the resources impressed with the trust. The state owned the land subject to the trust, the court ruled, but the legislature was in control of the trust: "The legislature represents not only the State, which holds the title . . . , but the legislature also represents the public, for whose benefit the title is held . . ." If the legislature is the trustee, then *Illinois Central* and *Kirk* describe a trustee with great discretionary powers. The legislature as trustee can transfer trust lands to private parties, if it determines this to be consistent with the trust (*Kirk*). Or, it can revoke a transfer of trust lands to a private party, if it concludes *that* to be consistent with the trust (*Illinois Central*).

Another question: who has standing to assert that the trust has been violated? Here, the Illinois courts have oscillated between two analogies. First, they thought the proper analogy to be public nuisance law, which makes the principal legal officer of the state (as relevant here, the state attorney general) the proper party to represent the public in bringing an action alleging a breach of the public trust. Later, after an intense internal debate, the Illinois Supreme Court decided that the better analogy is to certain state constitutional provisions regarding misuse of public funds, which had been held to allow any taxpayer to sue.

Today, then, any Illinois taxpayer can bring an action claiming a violation of the public trust. As the Seventh Circuit held in August 2020, in one of the last intermediate-appellate opinions by then Seventh Circuit Judge Amy Coney Barrett, this means that Illinois permits suits to enforce the public trust without a plaintiff's having suffered injury in fact, as is required by Article III for an action in *federal* court.

A third question: if the attorney general or an Illinois taxpayer gets to court and asserts a violation of the public trust, what standard of review will the court apply in deciding whether the state legislature, as trustee, has breached its fiduciary duty to the public? On this question, the decisions are very difficult to reconcile. Some, like the *Kirk* case, seem to say that the

legislature has virtually unreviewable discretion. Others have invoked a standard that sounds almost like strict scrutiny.

In a 2019 decision involving a public trust challenge to the construction of the Obama Presidential Center in Chicago's Jackson Park, along the lakefront some seven miles south of downtown, U.S. District Judge John Robert Blakey thought that a different standard of review applies depending on whether the proposition is to fill land under the lake, to change the use of *previously* filled land, or to change the use of public land that was never under the lake. (In rejecting a challenge to the project, Blakey concluded that the Obama Presidential Center is slated to be built on land that was never under the lake; Blakey's decision was vacated on jurisdictional grounds by Judge Barrett's Seventh Circuit decision mentioned above.)

And, finally, perhaps the most important question: what resources are covered by this public trust? What is the *res* of the trust? *Illinois Central* and most succeeding cases were reasonably clear: the trust is designed to ensure that "the people of the State . . . may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." Hence, the trust applies to navigable waters and the land beneath them.

For the most part, the Illinois decisions have remained faithful to this understanding. The one major exception involves a decision in 1970 (*Paepcke v. Public Building Commission*) that concerned a proposal to build a schoolhouse in a public park created on land that had never been submerged. But the Illinois Supreme Court in that case, though viewing the park as impressed with a public trust, never explained why this should be so—and no consequences attached to the view, as the court rejected the claim that placing a school building there would violate the trust.

The theory of *Illinois Central* in 1892 was that the trust applies to navigable waters, and the land beneath, because these resources were conveyed to the state when it was admitted to the union on the (implicit) understanding that these resources were to be held in trust for the public. A public park on land that was never submerged can be acquired in multiple ways—by donation, purchase, or condemnation—with or without any condition that the park be held in trust for the public.

It is probably a good idea to provide some legal check on decisions by local politicians to turn parks into other uses. Perhaps such actions should require the explicit approval of the state legislature. But there is no clear theory that would allow the public trust recognized in *Illinois Central* to expand beyond the nexus to navigable waters, on the mere say-so of the courts—that is, no theory that would explain why the title to parks, or why only some parks, should be viewed as held in a trust of that sort.

All in all, the public trust doctrine, when viewed as a type of trust law, is afflicted with, if not imponderables, then questions not readily susceptible to principled or especially persuasive resolution. Who is the trustee? Who can sue to enforce the trust? What is the standard of review in determining whether an action breaches the trust? What is the trust *res*? Courts have struggled to answer these questions, leaving us with a doctrine that is most uncertain in its scope and application.

We will spend more time with the public trust doctrine, as it has developed, in subsequent posts, but we will next focus on this: Given the confounding questions presented by the

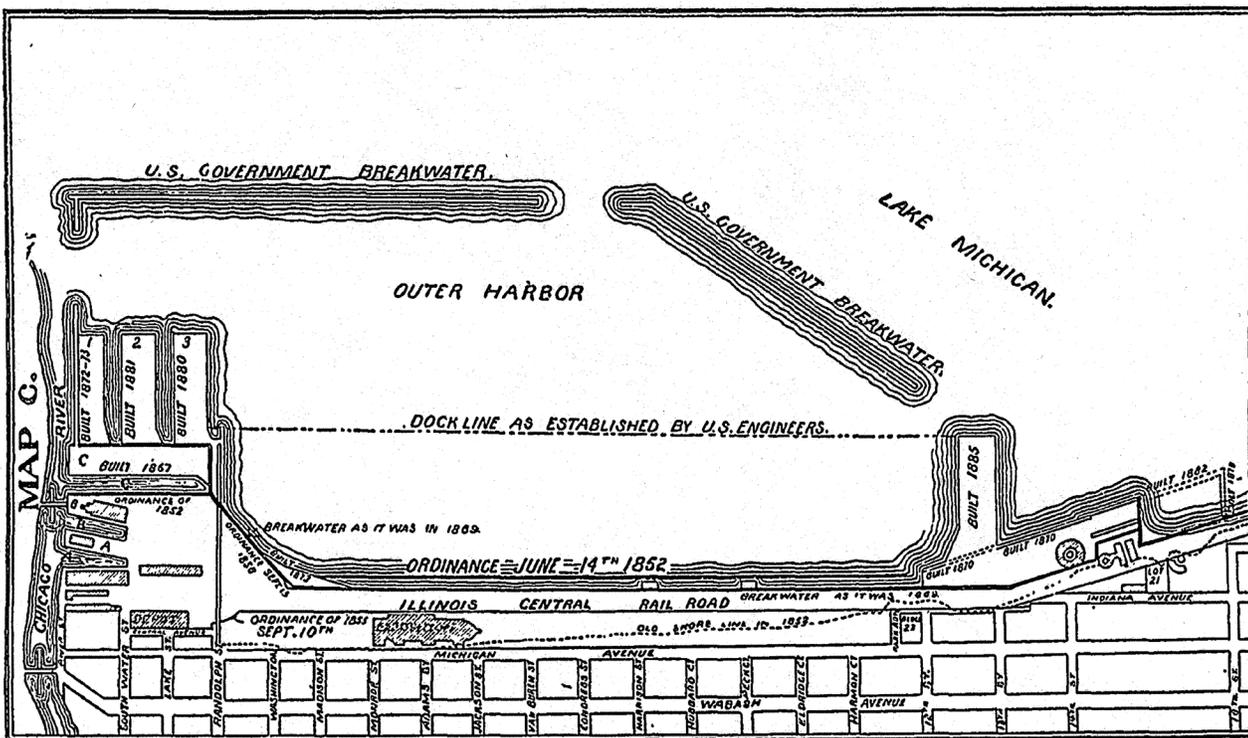
public trust doctrine, how *did* Chicago succeed in creating and then preserving a splendid lakefront? The answer lies in part in a doctrine that we will consider in our next (third) post: the similar-sounding, but quite different, public dedication doctrine.

3. Comparing Public Trust and Public Dedication

A right that *private* property owners enforced—called the public dedication doctrine—rather than the public trust doctrine has been the successful device for preserving Chicago’s famous downtown lakefront park.

The public trust doctrine is frequently invoked by environmentalists and preservationists who want courts to block particular projects. The Chicago lakefront, its modern birthplace (as recounted in our inaugural post in this guest series), provides a kind of natural experiment for considering how well the public trust doctrine performs in realizing this preservationist ideal. As documented in our new book, *Lakefront: Public Trust and Private Rights in Chicago* (Cornell

And, finally, perhaps the most important question: what resources are covered by this public trust? What is the *res* of the trust?



The so-called Morehouse map, reprinted here from the reporter’s statement of the case in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 413 (1892), shows the Chicago lakefront east of downtown in the early 1880s, including the Illinois Central operations and improvements. The map here runs horizontally, north (left) to south (right), from the Chicago River at one end to 16th Street at the other. Much of the area both west (closer to shore) and east of the dock line was subsequently filled and today is Grant Park.

It turns out that the public dedication doctrine has proved a more powerful form of protection against encroachment on public rights than the public trust doctrine.

University Press), there were two competing doctrines, applicable to different segments of the Chicago lakefront. The public trust doctrine applies up and down the eastern front of the city, to land under (or once under) Lake Michigan.

In the *center* of the city's lakefront, in what is now called Grant Park, a different legal precept—called the public dedication doctrine—has been in play. It turns out that the public dedication doctrine has proved a more powerful form of protection against encroachment on public rights than the public trust doctrine.

The public dedication doctrine is a creature of equity. It holds that a private party who purchased property abutting land that is marked on some kind of public map or plat as being dedicated to a public use can sue to enjoin a deviation from that public use. In the case of downtown Chicago, lots were sold by early developers using maps that identified the area east of Michigan Avenue as being a “public ground for ever to remain vacant of buildings,” or words to that effect.

Persons who bought lots on the west side of Michigan Avenue were willing to pay a premium for such a lot because it gave them a direct view of the lake. These purchasers could plausibly maintain that they had relied on the dedication appearing on the early maps and thus expected that their view of the lake would never be encumbered by the erection of “buildings.”

The Michigan Avenue owners were not shy about acting to enforce their public dedication rights. In 1864, for example, they sued to block the Democratic Party from erecting a temporary “wigwam” in the dedicated area for the purpose of nominating General George B. McClellan as its candidate for president.

The most persistent litigant was Aaron Montgomery Ward, the catalog merchant, who brought or threatened to bring dozens of legal actions in the late 19th and early 20th centuries against various proposed structures and activities in the protected area. His greatest triumph was to block the construction of the Field Museum of Natural History in the center of what is now Grant Park, which is why the museum had to be located outside of the dedicated area, to the south of the park, at what is now called Roosevelt Road. Popular though the Field Museum (or Soldier Field, to its immediate south) is today, this is far enough from the commercial center of the city that most will not *walk* the distance.

Even after Ward's passing from the scene in 1913, the public dedication doctrine has been invoked by generations of Michigan Avenue owners to keep Grant Park largely free of encroachments. The only major exceptions, built more than 100 years apart, are the Art Institute and the whimsical structures of Millennium Park, in the northwest corner of the dedicated area. These were allowed based on representations (somewhat dubious in both cases) that they enjoyed the *consent* of all directly abutting property owners.

At times, the property owners have been overzealous. A new bandstand in Grant Park was blocked for years with threatened lawsuits, even after the old one was so decrepit that it caused a grand piano to fall through the stage. But it is undeniable that the 319-acre park in the center of the city is remarkably free of monumental structures. For which, the public dedication doctrine deserves the credit.

In theoretical terms, public dedication is rather the opposite of the public trust. Public dedication is designed to protect private rights—the right of owners to rely on dedications that enhance the value of their private property. The public trust doctrine is designed to protect public rights—the right of the public to use certain resources free of exclusion rights exercised by private property owners.

In *practice*, by harnessing the interests of private owners, the public dedication doctrine has proved to be the more powerful in protecting certain public interests: namely, the right of the public to enjoy the open space of a huge, centrally located, metropolitan park. It is worth pondering why this might be so. A primary factor concerns who has standing to sue.

The public trust doctrine in Illinois (this aspect of its development is among the things sketched out in our second post) can be enforced either by the attorney general or by any taxpayer. In practice, this means that either one faction of the political establishment must sue to block what another faction of the political establishment wants to do, or a coalition of taxpayers must form that has sufficient funding and unity of purpose to oppose what the (often-united) political establishment wants to do. These conditions will not always be satisfied.

The public dedication doctrine, by contrast, can be enforced by any private property owner whose land abuts a dedicated space and who believes that

what the political establishment wants to do will devalue his or her property more than it will cost him or her to sue. At least for major deviations from the dedication, this may elicit a more consistent enforcement of public rights than does the public trust doctrine.

The major weakness of the public dedication doctrine is that there must be a dedication, whether it be for a park, or an open space free of buildings, or something else. The area that comprises Grant Park was favored with such a dedication. Other areas up and down the lakefront were not. Hence, we see a more checkered pattern of protection of public rights outside the center of the city, especially when projects are proposed that have the strong support of the political establishment.

As we shall see in our fourth (and penultimate) post, the Illinois Supreme Court repudiated the common-law public dedication doctrine in 1970, casting its lot exclusively with the public trust doctrine. In our view, this was a mistake. Often, harnessing private rights can do more to protect the public interest than can a more overtly public-sounding doctrine.

4. The Public Trust Doctrine—Enter Professor Sax

In 1970, the public trust doctrine got new life, simultaneously with a larger environmental revolution.

Our first and second posts in this guest series described not only the U.S. Supreme Court's unexpected announcement of the public trust doctrine in the 1892 *Illinois Central* decision but also the subsequent determinations by the Illinois Supreme Court that the state legislature was the trustee of the public trust and that the judiciary would defer to the trustee's decisions. With this latter set of determinations, the public trust doctrine effectively became little more than a requirement that the legislature *authorize* any project entailing landfilling in Lake Michigan. As we recount in our new book, *Lakefront: Public Trust and Private Rights in Chicago* (Cornell University Press), this understanding of the trust prevailed for the next 75 years.

Then, in 1970, the Illinois Supreme Court abruptly changed direction. Relying on a new article in the *University of Michigan Law Review* by Joseph L. Sax, a professor at that school, the

court reformed and invigorated the public trust doctrine, even if the precepts were scarcely clearer than they had been when the doctrine emerged from the U.S. Supreme Court in 1892.

The understanding that the public trust doctrine required little more than legislative approval was dramatically illustrated by an episode that occurred in the early years of the 20th century. A large steel mill owned by the U.S. Steel Corporation, known as the South Works, was discovered to have augmented the size of its holdings by dumping slag into Lake Michigan, on the far South Side of Chicago. After litigation between the company and local authorities (which wanted to recover property taxes on the filled land), the state legislature in 1909 resolved the issue by granting the company 234 acres of submerged land—more than enough to ratify the illegal fill. The state attorney general, in a superficial analysis, assured the governor that he could sign the bill without any concern that the grant violated the public trust identified in the *Illinois Central* decision.

The following decades would see landfilling up and down the lakefront, all authorized by the legislature. Perhaps most consequentially, park districts on the North and South Sides of the city (later merged into a single Chicago Park District) were given authority by the legislature to fill the lake along the shore so as to construct a system of parks and, as part of the construction, to extend Lake Shore Drive farther north and south.

In order to buy out the riparian rights of existing landowners along the lake (e.g., their right of access to the water), the legislature authorized the park districts to enter into what became known as “boundary agreements.” By fixing the boundary

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Professor Joseph L. Sax, ca. 1967. Courtesy of the University of Michigan Law School.

The most striking illustration of the state of the public trust doctrine was the decision by Northwestern University, in the early 1960s, to double the size of its campus in Evanston by landfilling in the lake. . . . The lawyers were familiar with the *Illinois Central* decision, but counseled that it was “very old” and “obsolete.”

of the retained property somewhat more to the east (into the lake), these agreements gave the riparian owners additional submerged land, typically about 100 feet wide, which they could fill and do with as they pleased. This land was no longer in the water or at its immediate edge, given the construction of the parks and drive between the new boundary and the lake (farther) to the east, but it was *more land* for the private party. No lawsuit was ever filed challenging this massive disposition of submerged land as a violation of the public trust.

Other public projects that entailed landfilling approved by the legislature also passed muster with little controversy. The construction of Navy Pier (begun in 1914), of a water filtration plant (approved in 1954), and of the McCormick Place convention center (1958) all fit this description. The latter two projects stimulated litigation, primarily by taxpayers objecting to the cost, but attempts to raise the public trust as grounds for objection were brushed aside by the courts with a perfunctory analysis.

The most striking illustration of the state of the public trust doctrine was the decision by Northwestern University, in the early 1960s, to double the size of its campus in Evanston by landfilling in the lake. The university’s lawyers advised that the project could go forward so long as the legislature approved a grant of the submerged land for this purpose and the U.S. Army Corps of Engineers signed off that the new land would not interfere with navigation. The lawyers were familiar with the *Illinois Central* decision, but counseled that it was “very old” and “obsolete.” They were right: with the blessing of the legislature and the Army Corps, the project elicited no recorded objection based on the public trust doctrine (or on any other basis to speak of).

In 1970, this minimalist conception of the public trust suddenly changed. Professor Sax published in that year what is undoubtedly the most consequential article ever written about the public trust doctrine. The article was motivated by Sax’s fear that public authorities could be induced to convey valuable public lands to private interests with little input from the public. He recognized that change is inevitable, and he did not oppose all such transfers. But he argued that the public trust doctrine, as invoked in the *Illinois Central* decision and in other scattered cases outside Illinois, could be reformulated to require some kind of public approval process before such transfers take place, with courts applying a sufficiently probing

review to assure that proper deliberation and consideration of the public interest had occurred.

Later that same year, the Illinois Supreme Court heard a challenge to a proposal to transfer a portion of an inland public park on the South Side for the construction of a public school (this was Washington Park, shown on the map on p. 33 of this magazine). The plaintiffs in the case, *Paepcke v. Public Building Commission*, challenged the proposal on statutory grounds, under the public dedication doctrine, and under the public trust doctrine. The court was unanimous in rejecting the challenge on all counts. But as fate would have it, the assignment to write the opinion went to one Justice Marvin F. Burt, who had recently been appointed to fill a vacancy on the court created by the resignation of a justice embroiled in a scandal. Burt, a longtime supporter of public parks, wrote an opinion that illustrates the power of the sequencing of issues and of dicta.

Burt’s opinion in *Paepcke* concluded several things, explicitly or implicitly: (1) that any taxpayer in Illinois has standing to bring a public trust claim; (2) that the common-law public dedication doctrine (the topic of our third post) is no longer of any force in Illinois; (3) that the public trust applies to a public park, without regard to whether it sits on land that was once under navigable waters; and (4) that the public trust doctrine is not limited to protecting the public’s interest in accessing navigable waters to engage in commerce or fishing, but applies to any decision to subject public resources “to more restricted uses *or* to subject public uses to the self interest of private parties.”

For the last proposition, including the emphasis, Justice Burt quoted with approval the law review article published earlier that year by Professor Sax. Without anything that could be described as meaningful analysis, he then proceeded to approve the use of the park for construction of a school as consistent with the public trust, generating the disposition of the case—which rejected the plaintiffs’ challenge on all counts—as approved by all the other justices.

After *Paepcke*, the public trust doctrine in Illinois took a very different turn. It would be flattering to the law professoriate to think that Professor Sax should be credited with the change. His article unquestionably was consulted by Justice Burt, and gave the justice confidence that the public trust doctrine was the ticket to enlisting the courts in the cause of providing greater protection to public parks.

Yet the precise proposal advanced by Sax—a call for greater deliberation through public hearings before public lands are turned over to private interests—makes no appearance in Burt’s opinion. Sax would have applauded universal citizen standing, the implicit extension of the public trust to resources other than those connected with navigable waters, and the caution against giving politicians free rein to transfer public resources to private interests. But he would have been perplexed by the absence of any institutional mechanism to ascertain the public will, other than the occasional lawsuit asserting a violation of a nebulous trust doctrine.

Primary credit for the transformation of the public trust doctrine must be given to the temper of the times. The year 1970 saw the first Earth Day in April, with widespread public demonstrations supporting greater environmental protection. Congress got into the act, passing the National Environmental Policy Act and the Clean Air Act. The Nixon administration created the Environmental Protection Agency by executive order, using reorganization authority since repealed. And the D.C. Circuit was busy giving a “hard look” to governmental decisions affecting the environment.

Paepcke was yet another manifestation of this public mood. Sax’s role was to legitimate what one member of the Illinois Supreme Court wanted the law to say. *Paepcke* put the public trust doctrine on a new path. But, as we shall see in our fifth and final post, that path was not at all clearly marked.

5. The Public Trust Doctrine Today: A Litigation Roulette Wheel

Success via the doctrine depends more on somehow securing federal jurisdiction, at least briefly, and on decisions judges make in managing their dockets, than on any remotely predictable criteria.

The transformation of the public trust doctrine in *Paepcke v. Public Building Commission* in 1970, described in the fourth entry of this five-post guest series and at greater length in our new book, *Lakefront: Public Trust and Private Rights in Chicago* (Cornell University Press), soon bore fruit in terms of the first (and only) invalidation by the Illinois Supreme Court of a legislatively authorized project involving landfilling of Lake Michigan.

The story involved U.S. Steel’s South Works. In 1963, the legislature authorized U.S. Steel to

fill an additional 194.6 acres in the lake for the steel plant’s expansion on the far South Side of Chicago. The Illinois Supreme Court rejected one challenge to the plan in 1966. But for reasons that are unclear, the corporation waited until 1973 to tender the modest sum of money (\$100 per acre) needed to take title to the submerged land. In the meantime, the political winds had shifted.

The state attorney general in the early 1970s, William Scott, was busy nurturing a reputation as a champion of the environment, which he hoped to parlay into the Republican nomination for a U.S. Senate seat (both political parties sought to capture the environmental vote back then). Suing on behalf of the people, he asked the courts to block the sale of submerged land to U.S. Steel as a violation of the public trust doctrine.

In 1976, in *People ex rel. Scott v. Chicago Park District*, the Illinois Supreme Court ruled against the project. Citing and quoting Professor Sax as in *Paepcke*, the court suggested that the public trust doctrine prevents any conveyance of public lands for private purposes. It acknowledged that the legislature had made express findings that the conveyance in question

Professor Sax published [in 1970] what is undoubtedly the most consequential article ever written about the public trust doctrine.



LAKEFRONT

Public Trust and Private Rights in Chicago

JOSEPH D. KEARNEY AND THOMAS W. MERRILL



Loyola’s plan was *much* more modest than Northwestern’s Everyone from local politicians to community groups to the state legislature to agencies of the federal government signed off.

would turn “otherwise useless and unproductive submerged land into an important commercial development to the benefit of the people.” But it rejected “[t]he claimed benefit [of] additional employment and economic improvement” as “too indirect, intangible and elusive to satisfy the requirement of a public purpose.”

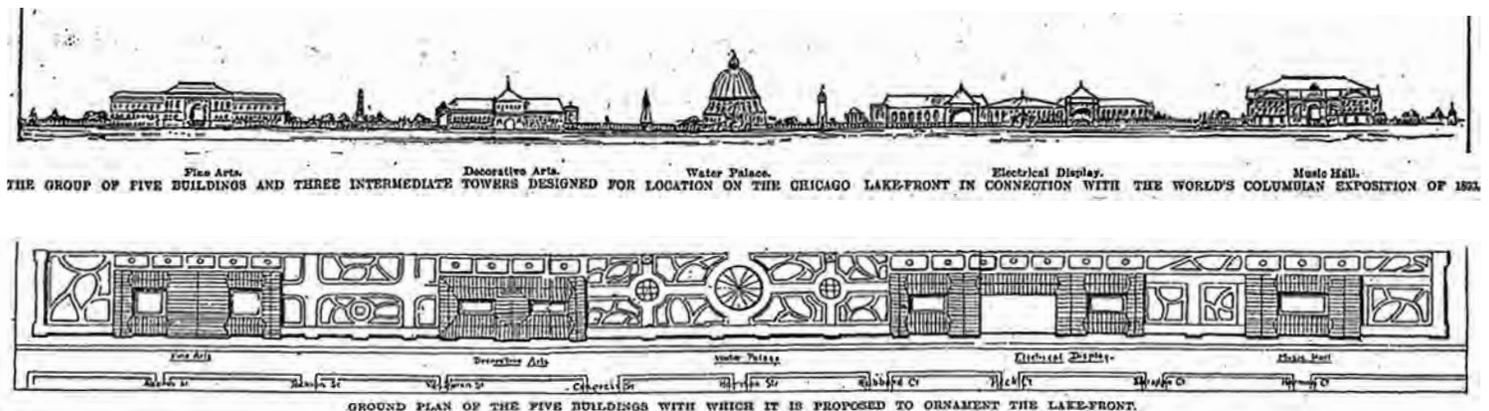
Factually, the *Scott* case was closer to the original (1892) *Illinois Central* case than to *Paepcke*. The proposal involved a plan to fill a large amount of open water for the benefit of a private corporation, not the transfer of a chunk of inland park to construct a public school. Thus, the *Scott* decision did little to clarify what resources are covered by the public trust or what is meant by a private, as opposed to a public, purpose for a transfer. It did suggest, however, that the broad deference to the legislature, which characterized the decisions before *Paepcke*, had been replaced by something closer to strict scrutiny.

The aggressive stance reflected in *Scott* was soon emulated by a federal district court in a decision that provides an ironic juxtaposition to the Northwestern campus expansion in the early 1960s. In the late 1980s, Loyola University, on the North Side of Chicago and barely four miles south of Northwestern, was effectively blocked from expanding into the surrounding neighborhood, just as Northwestern had been in Evanston. Like Northwestern, it concluded that its best option was to fill a portion of the lake to the east.

Loyola’s plan was *much* more modest than Northwestern’s; included public access and uses; and, unlike Northwestern’s, underwent a rigorous environmental review that resulted in modifications designed to satisfy a variety of federal and state environmental agencies. Everyone from local politicians to community groups to the state legislature to agencies of the federal government signed off.

But Loyola’s plan was contested by an environmental group that got into federal court based on its challenge to the federally mandated environmental review and that raised the public trust doctrine as a matter of what is now called supplemental jurisdiction. The federal court ignored the federal challenge; extrapolating from *Paepcke* and *Scott*, it held that the project violated the state law public trust doctrine. Loyola soon announced that the funds it had set aside for the project had been exhausted by consulting and legal fees, and decided not to appeal, despite the district judge’s curious exhortation that it should do so.

Subsequent decisions can only be described as a mixed bag. In *Friends of the Parks v. Chicago Park District* (2003), the Illinois Supreme Court upheld a remake of the venerable Soldier Field, designed to retain the Chicago Bears as principal tenant of the stadium. Although accommodating the wishes of a professional football team might seem to be a “private purpose,” the court stressed



This image, from the *Chicago Tribune*, January 20, 1891, shows illustrations of the five buildings envisioned for Lake (Grant) Park as part of the 1893 Columbian Exposition, reflecting a street-level view from Michigan Avenue (top image) and the ground plan (bottom). Left to right (going south, from Monroe Street to Park Row, near 12th Street or modern-day Roosevelt Road) were the imagined fair homes of Fine Arts, Decorative Arts, Water Palace, Electric Display, and Music Hall. These renderings were designed to build public support for a downtown location; *Lakefront* unearths why, instead, the world’s fair was built approximately seven miles to the south, in Jackson Park.

that the park district would remain “the owner” of the stadium and hence would retain significant “control” over the use of the facility. The court assumed without discussion that the public trust applies to the stadium, built on landfill in 1924 by a predecessor of today’s park district.

The two most recent decisions, both in federal court, came in citizen suits challenging nonprofit foundations that wanted to build museums on the lakefront honoring the accomplishments of notable individuals.

The first involved a proposal to build the Lucas Museum of the Narrative Arts, to be paid for and operated by a foundation established by the filmmaker George Lucas and to display (among other things) props from his *Star Wars* films. Although the city establishment was enthusiastic about the proposal, envisioning additional jobs for the economically distressed South Side and more tourist traffic, the Friends of the Parks did not like the design or the self-referential aspect of the project. The group managed to get the matter into federal court on a dubious theory of federal jurisdiction and to tie it up there. In 2016, George Lucas got disgusted with all the delay and announced that he would build his museum in Los Angeles (opening is projected for 2023).

The second involves the Obama Presidential Center (OPC), a museum honoring the nation’s first African American president and sometime Chicago resident. The facility will include a digitalized version of what was once called a presidential library. Chicago won the competition to be the site of the OPC, to general acclaim. The only disagreement was whether the OPC should be located in Jackson Park, on the lakefront, or farther west, in and along Washington Park.

A group calling itself Protect Our Parks sued in federal court to block the use of the Jackson Park site as violating the public trust doctrine. This was rejected by Judge John Robert Blakey on the ground that the site in question had never been submerged land, and that the relevant precedent (*Paepcke*) only required express legislative authorization, which had been secured. The decision was vacated on appeal, in an August 2020 opinion by then-Judge Amy Coney Barrett, on the ground that the plaintiffs had failed to plead injury in fact, as required to establish federal court jurisdiction. The group is now back in the district court, with a new lawsuit, arguing that the federal review of

environmental impacts was inadequate. It also raises the public trust question anew, based on supplemental jurisdiction. [Subsequently this past summer, the district court denied an injunction to halt commencement of the Obama Presidential Center project in Jackson Park, and the Seventh Circuit and U.S. Supreme Court similarly denied relief.]

Collectively, the post-*Paepcke* decisions suggest that the public trust doctrine has become a kind of roulette wheel in determining whether particular development can move forward on the Chicago lakefront. It is unpredictable whether advocacy groups will sue to enforce the doctrine. It is unpredictable how the courts will respond. The Lucas Museum case and the Loyola case show that one need not secure a final judgment in order to affect the outcome. Rulings by trial courts refusing to dismiss a case can impose enough delay to cause the cancellation of projects. These concerns are magnified if the matter is litigated before a single federal judge insulated from the ordinary political process.

This is not what Professor Joseph Sax envisioned when he advocated an expanded use of the public trust doctrine to allow broader public participation in decisions to transfer public resources to private entities. And where federal permits are needed, a participatory process may be required by the National Environmental Policy Act. States are free to mandate a similar process when state and local parks, wilderness areas, or other state-owned natural resources are proposed to be privatized in some fashion. Explicit approval by the state legislature, consistently required by the Illinois public trust doctrine for 125 years, is another good idea. This assures that a broadly representative body, the state legislature, takes a close look at a project before it is finally approved. But asking a court, often a single federal judge, to decide whether the nebulous public trust has been violated, serves only to defeat the popular will on what amounts to a random basis.

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This is our fifth and final guest post. Great thanks to Eugene Volokh, Jonathan Adler, and the other members of *The Volokh Conspiracy* for this privilege. See you at *The Faculty Lounge* and at *PrawfsBlawg* later this summer—and perhaps at the *Lakefront*. ■

Collectively, the post-*Paepcke* decisions suggest that the public trust doctrine has become a kind of roulette wheel in determining whether particular development can move forward on the Chicago lakefront.



Illustrations by Taylor Gallery

TOO SLOW, TOO BIG, TOO HEAVY-HANDED

MARQUETTE LAW PROFESSORS SEE NEED FOR CHANGES IN THE WAY THE CRIMINAL JUSTICE SYSTEM OPERATES ON A DAY-TO-DAY-BASIS.

Recent issues of *Marquette Lawyer* have offered perspectives from prominent scholars on the state of the criminal justice system in the United States. A central question has been whether the system can be changed to produce more just, more constructive, and fairer outcomes.

In large part, the scholars have been, shall we say, the visiting team—literally so, in that they came to Marquette Law School to deliver major lectures. To continue our focus on these issues, we decided to call in some members of the home team—scholars on the faculty of Marquette Law School—for their insights.

Gathered around a table in Eckstein Hall, the participants were Professors **Daniel D. Blinka**, **Edward A. Fallon**, **Michael M. O’Hear**, and **Andrea K. Schneider**. Moderating the conversation was **Alan J. Borsuk**, editor of *Marquette Lawyer*.

Blinka, a former Milwaukee County prosecutor who teaches courses including Criminal Law and Constitutional Criminal Procedure, also holds a Ph.D in United States history. Fallon, whose specialties include constitutional law and white-collar crime, is the new chair of the Milwaukee Fire and Police Commission. O’Hear is a nationally recognized authority on criminal punishment and author of books including *The Failed Promise of Sentencing Reform* and *Prisons and Punishment in America: Examining the Facts*. Schneider is an expert on alternative dispute resolution; among her books and articles, she was coauthor of the 2019 book, *Negotiating Crime: Plea Bargaining, Problem Solving, and Dispute Resolution in the Criminal Context*.

Here is a condensed and lightly edited transcript of the conversation.

BORSUK: The first and, I think, the biggest question is this: How well is the criminal justice system working on day-to-day basic cases, the ones that don't make big headlines?

O'HEAR: I think there are some reasons to feel good about how the system is functioning and there are some reasons to be concerned about the way the system is functioning. Based on the empirical data about sentencing and about who ends up in prison, the biggest determinants of sentencing outcomes are offense severity and criminal history, which are generally regarded as perfectly appropriate factors to take into account in sentencing.

Contrary to the beliefs of a lot of people, our prisons are not full of nonviolent drug offenders. The great majority of the people in prison have been convicted of violent crimes. It seems to me that the system is doing a reasonably good job of distinguishing between more serious cases and less serious cases and imposing more severe outcomes on the more severe cases. So I would say the system does reasonably well in its relative treatment of different offenders.

The real problem, to my mind, is the overall scale of severity of the system. If you look at our incarceration figures in the United States, we incarcerate still at very high levels compared to international norms and also compared to our own historic norms. But the severity doesn't even end with incarceration. If you look at the number of people we have on community supervision, we put far more people on supervision than other countries do. And even at the lowest levels of the system, even for people who are getting no community supervision, the financial penalties can be very severe, considering the great majority of defendants are poor.

SCHNEIDER: One of the things I'm curious about is that there are differences in populations who get swept up, at the beginning, for what is a nonviolent offense or a minor offense. Joyriding, whatever—those kinds of things. When we get to sentencing (for a subsequent matter), the judge looks back and says, "Well, yes, this person has already had contact with the

criminal justice system." But the fact of the matter is that it is likely that if that person had been in a different part of the city, they wouldn't have been picked up and wouldn't have been considered to have contact. So it looks objective, but, of course, there are racial differences.

O'HEAR: Agreed. Criminal history is not perfect.

BORSUK: Do any of you see trends in that? I mean, post-Minneapolis and post George Floyd and with all the priority that has been given to racial disparities, is anything changing?

FALLONE: I think what's changed is that the focus is no longer solely on the justice system and its impact on the particular defendant. I think what you see is people marching across the country because they're saying that they care about the impact of the justice system on the broader community. And so incarceration rates are an issue because multiple generations of African American males have been separated from their families and cannot serve as father figures, which leads to generations of African American youth who are in a fractured family environment. There are mental health impacts. People increasingly question the criminal justice system's being used to address people's mental health incidents and the impact that has on their lives, their families' lives. And so I think it's great to talk about the fact that we are identifying violent criminals to a large degree and incapacitating them in prison. But that still doesn't answer the question: what is the cost to the broader community?

SCHNEIDER: Anybody would be arrested for breaking and entering. It's that we incarcerate people for months, if not years, longer than other countries for the same crime.

O'HEAR: Yes, I think the punishment decisions we make operate along two different dimensions. One is that you want to make sure that you're treating people in the right way relative to other defendants in the system, so you want the most dangerous people who have committed the most serious crimes getting the most serious treatment, and so on down the line, so that there's a sensible relative ordering. That's one



Daniel D. Blinka



Edward A. Fallone



Michael M. O'Hear



Andrea K. Schneider

dimension. And I think the system does an okay job at that, not a perfect job by any means.

But I think the bigger problem with the system is along the other dimension, which is, what is the level of punishment that's attached when we say, "All right, this person's the most dangerous person who committed the most serious crime, and this person should get the second-most severe punishment, and this person should get the third-most severe punishment." What exactly is the punishment level that we're attaching to the scale? And that's where I think we, through a generation, have become much more severe than we used to be and much more severe than any peer country in the world.

BLINKA: Another thing I ask is: how do we define outcomes? One way to look at it is who's going to prison and for how long. Yet I can remember a time back in the late '70s, early 1980s, when the number of homicides in Milwaukee on an annual basis was in the upper 30s, low 40s. Every once in a while it would creep up near 50, and we'd say, "What the hell is going on?" By late August this year, the city had about 120 homicides. And those are just the homicides. Tracking the gun violence—any kind of a crime involving a firearm is just through the roof. Probably the homicide rate would be even higher except that we've got really good medical services here in Milwaukee, so, thankfully, not everyone is dying.

The criminal justice system does an okay job for certain kinds of problems. What the criminal justice system does really well is to take really violent offenders—the murderers, the ones who do terrible sexual assaults—identify them, prosecute them, and lock them up. The rest of the time, we haven't come up with an effective plan.

So my analogy is this: The criminal justice system is kind of like the emergency room where we take care of the violent offenders. The problem is, what's going on in the rest of the hospital where the treatment isn't as effective as we would like it to be? This tracks back to the problem of expecting too much from police. They're expected to handle everything, and they simply can't do it. And even when we do throw people in jail and drag them into court, what happens? We don't often have the kinds of resources to give to these people—whether they're victims or defendants—what we wish.

BORSUK: We've had a big spike in Milwaukee this year in auto thefts. Someone gets picked up for stealing cars—let's say not a juvenile, an adult. How's the system going to work for that person?

BLINKA: Well, apparently the problem is that they're going to blame the car manufacturers for making the cars too easy to steal.

SCHNEIDER: Part of the problem is: who are you, and where did you steal the car? If you go out to the suburbs,

the punishment can be quite different than if you're caught in the city. I think there are concerns when the outcome actually depends on where you steal the car, let alone the brand, how old you are, and, frankly, what race you are. That's the kind of thing that makes you question the system. What do we want to happen? We don't want this person to steal any more cars. Will throwing you in prison for X amount of time actually deter you or will it so punish you that you know when you get out you're never going to be able to hold another job, your record is going to follow you, and you will have no choice but to hook up with the band of car thieves that you were part of beforehand in order to make money? That's part of the problem of collateral consequences that follow you for far longer than the crime would argue.

BORSUK: Is the person charged with auto theft going to get decent legal representation? Is that system working?

BLINKA: Highly unlikely. That's the problem with the plea-bargaining system. You have to factor in wealth. Some wealthy kid is going to have a very different outcome in the system than some, let's say, white kid from the lower middle class or even a poor family. And then we factor in race, and it really falls off the table.

We talk about sending to prison, sending to prison. You know what? I look at this and say, here's what we should do: The first time you steal a car, all that's involved is we hold the case open and tell you, "Don't do it again." The second time you do it, you get 5 days in jail, 10 days in jail. I mean the system we have—and even more now with COVID—we're backed up a couple years on misdemeanors. What the hell kind of system is that? I might go to jail in a couple years? See you next time I'm arrested.

And we've got to bail people out because we don't have any room for them in the Milwaukee County Jail or we can't send them to the Milwaukee House of Correction. So they continue to steal cars or whatever it may be. Maybe part of the answer is saying, "Look. We need swifter outcomes." We need a way to say, "Let's try this kid in two weeks or three weeks and impose, let's say, three to five days, so he knows if you screw up, you're going to get arrested, then you're going to be punished and punished quickly." None of this silliness of a couple of years.

FALLONE: We've created a system that is so expensive in terms of defendants and the legal costs of the defense. We've got that whole class issue in terms of who can afford lawyers. But it's also expensive institutionally just to operate. You can't be nimble; you can't all of a sudden take 100 cases and go through the backlog. It's a very gold-plated, expensive system, and what we need is to be nimble.

That raises the questions of where we are putting our money, and why we are spending it on the things we're spending it on. A lot of institutional forces just want that



money to keep on going where it is going because they have staffing priorities, etc. So we should talk about trying to shift resources. Unfortunately, the phrase “defund the police” got associated with all sorts of things in the public’s mind, but I think it is a very serious issue. Why are we using such an expensive process for a lot of nonviolent crimes, misdemeanors, other crimes, when perhaps there’s an alternative, cheaper way to get quick justice?

SCHNEIDER: That also means we need to fund judges and public defenders. Look at how much money goes into correctional facilities and some of the lobbying organizations around that. If we are going to be nimble, we actually need more judges. If we are going to provide lawyers, we actually need to pay for public defenders.

BORSUK: Professor Paul Butler of Georgetown University spoke here two years ago and used both of the terms “abolish prisons” and “defund the police,” but interpreted them as saying “Let’s find better ways to do things. Let’s solve problems.” There is increased interest, including in Milwaukee, in steps such as sending social workers or psychiatric teams to deal with some problems. Is this a good step? Is it a feasible step?

BLINKA: I think the feasibility part of it is very interesting. We don’t need to get in the weeds on the alternative. But, boy, with some calls, I’d have my heart in my throat if I were an EMT and walking into a particular neighborhood or situation. I would want either the cops or somebody who is armed there with me. But particularly with a mental illness or drug addiction situation—and things like that—cops don’t have to be the first responders on everything. On the other hand, how do the responders know what they’re rolling into?

O’HEAR: It’s worth experimenting with and studying the outcomes. Milwaukee has been a place that’s been on the forefront of some interesting experimentation and research in the past. For instance, an important study done here in the 1980s on mandatory arrest policies for domestic violence showed that these arrests were not effective in reducing domestic violence recidivism. I think that this is the kind of study that needs to be done with innovative policies like that. There need to be careful, academic-quality studies testing whether innovations are successful. I can see theoretical reasons to think that they might be successful, but there are all kinds of practical issues as well.

FALLONE: One of the benefits of community-based policing is having police officers who are part of the community. They know the community, the community knows them, so they can get to know who in the neighborhood has mental health issues, who in the neighborhood is perhaps hanging out with the wrong gangs, etc. That reduces a lot of the uncertainty, and you’re not asking the police officer to instantly make an assessment of what they’re walking into if they already have strong ties to the community.

BORSUK: Is it feasible to do that to a scale that would make a difference, to have more social service resources available or to have people on call?

SCHNEIDER: It’s less expensive than incarcerating somebody for decades on end.

BLINKA: Or even arresting people. I mean the cops arrest somebody, you’re taking a squad out of service for a goodly period of time. And that means that that squad is not available to take other hitches and help other people.

I think part of the problem here is that our criminal code is just a wreck. I mean everybody who wants a crime put on the books seems to get the crime that they want. It's just a massively overgrown garden, and the problem is that it lends itself to arresting way too many people who should never be arrested or prosecuting people who don't need to be prosecuted.

Look at the Milwaukee County district attorney's office. When I was there in the late 1970s, I was at the bottom of the letterhead, and I think I was person number 49 or 48 or something. Now I think the number on the letterhead is north of 120. And the problem is that you get more prosecutors, you issue way more cases, and that puts so much stress on the system. Again, the sexual assaults and murders, those are straightforward to prosecute, I mean relatively speaking, but what about all of the misdemeanors?

FALLONE: Is it even possible to talk about that sort of a reform effort of the law when criminal law and policing has become so politicized?

BLINKA: Oh, absolutely not. But, I tell you, one of the most impressive things about Wisconsin politics as relates to criminal law is that, since I've been around or aware of serious issues, there's never been what I would call a strong conservative push for the death penalty in this state. I think that speaks well of our bedrock political culture that we've never had that battle over the death penalty here. Thank God for that.

BORSUK: Expand on saying that the criminal code is a wreck.

BLINKA: For example, take battery. Everybody's got their own statute. So somebody hits somebody else, intentionally causes injury, that's battery. But now we also have identity politics. So if your victim is elderly—well, that makes some sense. But then you get into things like battery to a technical college teacher and a number of other specialized batteries; these are instances where some group decided that they want their own battery statutes because it enhances their own identity or sense of professionalism. We don't need all that junk. The statute from the 1950s would work fine today.

O'HEAR: Just as an indication of the politics, I think it was about five years ago that the legislature created a legislative study committee to take a look at obsolete and unnecessary crimes in the criminal code. And a big report was issued after a lengthy analysis that identified several dozen crimes that could be eliminated without anybody feeling any loss. You know, things like crimes involving telegraphs or obsolete farm equipment.

BLINKA: Or tying your boat to a railroad trestle.

O'HEAR: A lot of patently unnecessary crimes were identified. A proposal was made to amend the criminal code accordingly—which went absolutely nowhere in the legislature.

FALLONE: If you're an elected politician and you favor such a sensible reform as eliminating "felony murder" (a crime that is on the books but almost never charged), can you imagine



the television commercial your opponent will run against you in the next election? “He voted to put murderers back on the street.” That sort of hyper-politicization has made it impossible to have reasoned discussion about what is effective and what works, because any attempt at reform—something different, something new—will immediately get cast in political terms and used against you.

SCHNEIDER: You can do it only at the end of your term, really, when you know you’re stepping down. This applies to judges also. Or you need to find some sort of nonpartisan commission, and even then it might go down in flames.

BORSUK: Mary Triggiano is the chief judge in the Milwaukee County Circuit Court, as you know. I asked her, in the course of working on a story for the spring 2021 *Marquette Lawyer*, what got her so interested in treatment courts as an alternative to conventional courts. Her answer was, “Outcomes.” She thought that what was happening as a result of conventional proceedings and sentencing just wasn’t productive, it wasn’t helpful to the people in front of the judge, and it wasn’t helpful to community safety. What’s your response to that word *outcomes*?

O’HEAR: “Are we getting good outcomes?” is a difficult question to answer. What are the outcomes we desire? Because you and I might have different ideas about what the ideal outcomes should be. I think when people talk about outcomes, that’s usually linked to evidence-based decision making. When people say, “Let’s focus more on outcomes,” what they usually have in mind is, let’s use data and research more to inform the decisions being made by the criminal justice system, particularly with an eye to recidivism reduction. Recidivism rates certainly are very high. There is some evidence they’ve been coming down marginally over the last 20 years or so. The kind of interventions that are being pushed now as evidence-based interventions have some demonstrated ability to achieve further reductions in recidivism.

If the outcome of interest is recidivism, the answer is pretty clear that the traditional system, the business as usual system, does not produce good outcomes.

SCHNEIDER: Some studies show that the highest predictor of likelihood to commit a crime is whether you’ve been imprisoned as a juvenile. If sending a kid to prison is the single best predictor of whether they’re going to commit another crime, why are we putting that kid in prison to just learn how to get better at that or to realize that they have limited choices?

If you look at treatment courts, an extraordinary amount of resources needs to be devoted to them. Many of us have gone to see how these operate. I would argue that the commitment

to have drug counselors tracking the people going through drug court and lawyers and social workers are all less costly than putting that person in prison, and, by the way, putting their children in the foster care system, which is also what’s going to happen. And so it’s a question of where we are devoting our resources. I think that’s really what Judge Triggiano is talking about.

At the same time, part of the concern with specialty courts is that we’re carving out those who are worthy of having special treatment, say, juveniles and those people who are addicted or veterans. That means some people are not worthy of the Cadillac approach, of getting the social worker and counseling and of seeing the judge every week in order to check in and show that you’re doing okay. The Cadillac approach would be terrific if we could figure out how to deliver that to more people.

BLINKA: What I’m left with, and I hate to be overly cynical about this, is that this system is being asked to do things it can’t possibly do. Putting on my historian’s hat here, there’s a fraying of the social fabric, and in some parts of the community what we have is, unfortunately, families that are not effective in terms of supporting family members. We have a dysfunctional school system. The transit system [to get to jobs], forget about that.

FALLONE: When we talk about measuring success, let’s also bear in mind you know if you have a system that relies on identifying offenders through almost random pat downs of people on the street in certain neighborhoods, stop and frisk taken to the extreme, if you have a system where an interaction with a civilian based on a minor offense, a traffic offense, for example, can escalate into a use-of-force situation, that’s not a successful system. So it’s not just about outcomes at the end. It’s also how the system treats people, deciding who gets caught up in it in the first place.

BORSUK: So what should we do about all this?

O’HEAR: I think we need to dramatically reduce the scale of punishment in the country. We can and should do that to bring ourselves more in line with international norms.

It’s an imperfect system. Human beings are running it. Whatever we can do, whatever reforms we want to make to the system, mistakes will be made. To my mind, the overriding priority for the system should be to minimize the damage that we do when we make mistakes in the system. So I think we could cut maximum sentences in half, pretty much across the board, and that could be done with little adverse impact on public safety, maybe no adverse impact at all. And it would just make all of the problems with this system seem much less serious and much less delegitimizing if the costs of errors were a lot lower than they are.

BLINKA: Oh, I agree with that. I'm old enough to remember a time where if somebody was sentenced for a felony for more than 10 years, it was like . . . wow. The sentences that are being handed down now, whether it's for burglaries, drug cases in particular, it's just unfortunate.

SCHNEIDER: We really need to think about that rehabilitation piece after incarceration, which we have defunded and deprioritized in the last 10 to 20 years. There's very little attention paid to reintegration into the community. Again, that's left to the nonprofit world to pick up, as opposed to being a state government priority.

BLINKA: A different conversation is, why don't we get rid of plea bargaining? Just get rid of it. And tell prosecutors to charge it. If you do this, one of two things is going to happen: either you try everything, or the defendant's going to plead to everything. But I think part of the problem is the coercion that is built into the plea-bargaining system, where a defendant feels that regardless of whether I'm innocent or whatever, I've got no choice but to plead guilty.

O'HEAR: And that's one of the reasons I say to reduce the stakes dramatically. Not just imprisonment, but fines, probation terms, probation conditions. Ratchet down everything in the system, which would greatly reduce the prosecutor's leverage in extracting plea bargains.

FALLONE: I would suggest that many of these reforms, like reducing the severity of sentences, handgun reform legislation, etc., might be politically out of reach. The next best option might be around the word *accessibility*, which means funding more diversion programs, more alternative treatment programs, and social workers who can monitor people. And accessibility of lawyers. Even though it is self-serving for a law professor to say we need more lawyers, one of the pernicious effects of plea bargaining, why it is so harmful, is lawyers, defenders, public defenders in particular, have such huge caseloads that they can't give adequate individualized attention to their cases. If they had lower caseloads, that would help a great deal. And in addition, there's the class impact. Middle-class teenagers who get in trouble have lawyers, private attorneys, who know how to work the system and how to get alternatives to trial, whereas low-income kids in trouble don't necessarily get that attention, legal attention. So accessibility, more lawyers, and more social workers.

BORSUK: When Tommy Thompson's autobiography came out several years ago, he took part in an "On the Issues with Mike Gousha" here at the Law School. I think it was one of the first times that he said the thing he regretted the most about his time as governor of Wisconsin was building so many prisons in the 1990s. We should have been investing in treatment programs, he said. Your reaction to that?

SCHNEIDER: He's absolutely right. We've chosen by where we spend our money to put our priorities into imprisoning versus dealing with the underlying causes.

BORSUK: Could prison be made a more constructive, shall we say, experience for people?

FALLONE: It never has been.

SCHNEIDER: I mean there are other countries that handle it better, that do more halfway-house work, that do job training, that do rehabilitation, that do everything from financial counseling to social work. Sure.

O'HEAR: But the benefits you get even from highest-quality, evidence-based, prison-based programming are on the margins. I mean, there are benefits. There are reductions in recidivism that can be achieved through very good prison-based programming. But it's going to affect maybe 10 percent—maybe if you're really lucky 15 percent—of the inmate population. It's better to deliver programming and treatment in the community than in prison because prison is such an artificial atmosphere. When people are released from prison, they still are going to face huge ruptures in their lives and the need to rebuild everything from scratch. If you want to rehabilitate better, it's better to keep people in the community where they can maintain whatever positive things they have going on—relationships, employment, housing—and deliver programming in a way that has more of a connection to their lives outside the institution.

BORSUK: When Professor Bruce Western of Columbia University was here at Marquette Law School several years ago, he emphasized that for people coming out of prison, if they have three things—stable housing, access to health care, and a job—their chances of moving into a stable lifestyle are much higher. Number one: does that make sense? Number two: is there a way to make that a more common experience?

FALLONE: Expunge criminal records, because once you have your record, you're not going to have access to a lot of housing because the landlord is going to do a background check.

O'HEAR: Expungement is a great idea, but that's serving the needs of a different group than the people who are coming out of prison. People coming out of prison are going on to supervision. You're not going to expunge their record on coming out. Research shows that in the first year after leaving prison, the transition is really rough. If you can design better reintegration systems to get people through the first year or two, they're most likely going to continue to succeed on a long-term basis.

And this is just the classic problem of social service resources and the criminal justice system. We don't have enough social service resources for people without criminal records. It's a tough sell to devote more of our overtaxed social resources to the people with criminal records, who are seen as undeserving or less deserving than the people who do not have a record.



BORSUK: Let's return to the racial equity aspect. Is it any better or worse than it used to be? And is it likely to get any better or worse?

O'HEAR: There's some evidence that racial disparities nationally have been declining marginally in recent years. In Wisconsin, the Black share of our prison population has ticked down a few percentage points over the last 15 years. So there are signs of progress, although hardly dramatic. You still see greatly disproportionate representation by Black people in our prisons. At this point, I think it's far too early to say whether the aftermath of the George Floyd killing will have any real impact. There's always a couple of years' time lag in criminal justice data—plus, everything from 2020 and 2021 is going be badly warped by COVID as well.

BLINKA: Regrettably, the historical record would not foster optimism about this. You consider the inner-city riots of the 1960s. You fast forward to 1981 and the case of Ernest Lacy in Milwaukee, who was allowed to die in the back of a police paddy wagon because they weren't going to give this guy mouth-to-mouth because he was Black. It turned out he was completely innocent of the rape they were arresting him for. Then in the early 1990s, we get Rodney King in L.A. Yet, as a society, we have this unfortunate capacity to forget things. So with George Floyd, people say, "Well, this will be different; this will be different." I say, "I hope you're right, but I wouldn't be really optimistic if you take a look at the historical record of what we've seen."

FALLONE: I think the technology has been game-changing. The fact that we have body-camera footage and cell phone footage. I think it has caused a lot of people in the public to question whether they even really understood police practices in this country. And it makes, I think, historical comparisons difficult because it's hard to tell whether what we're seeing on cell phone video of arrests and use of force is worse, more racially connected, or better. We just don't have that technological

record from the past. And so it causes you to question how much we really know about racial disparities in policing in the past.

BORSUK: Looking forward, is there hope for things getting better?

FALLONE: If one puts their faith in technology, I think use of body cameras on a regular basis can deter more extreme abuses, but you can't say just having more body cameras is going to do everything. You still have to pay attention to training. You still have to pay attention to recruitment. And you still have to pay attention to policing strategies. It's such a multifaceted issue, public safety, that you need a lot of things to change to make a meaningful difference.

BLINKA: Well said.

BORSUK: So back to our starting question: is the system working? Any concluding thoughts? You have the right to remain silent.

FALLONE: In early 2020, Andrea [Schneider] and I went with a bunch of Marquette law students to Northern Ireland and to Belfast. We toured a community that had a long history of paramilitary policing, a long history of civilians killed by security forces. Still to this day, there are giant murals painted in the neighborhoods celebrating the lives of civilians who died, some who were actually IRA members. We talked to a lot of families who were still grappling with the trauma of living under that kind of militarized policing for a long period of time, where any civilian was subject to being stopped and questioned and where extreme use of force was the norm. And I see that as a very cautionary tale. When you look at the United States and see how our police departments increasingly are militarized, and you see the murals across the country of people who were killed, the George Floyd murals, the Breonna Taylor murals, you start to wonder: Are we heading in that direction in the United States?

O'HEAR: I liked Dan Blinka's analogy to the emergency room and what's going on in the rest of the hospital. It seems to me that the system does a pretty good job, not a great job, but a pretty good job, of establishing accountability for people who commit major victimizing crimes. What we want from the system is not only retrospectively establishing accountability for bad stuff that's happened in the past. We also want the system to protect us prospectively from more bad things happening in the future. That's where the system doesn't work so well, and there is probably some significant room for improvement within the system.

That said, people need to appreciate more that, at the end of the day, what drives crime rates is less the activities of the criminal justice system and much more the broader social realities that are completely beyond the control of police, prosecutors, judges, and corrections officials. ■

MARQUETTE LAW SCHOOL AND ITS LAW REVIEW CARRY ON

Pandemic (or War) Notwithstanding

This set of entries begins with remarks by Dean Joseph D. Kearney at an end-of-year gathering for editors and members of the *Marquette Law Review* in Eckstein Hall's Lubar Center on April 9, 2021. The remarks noted the trying circumstances under which law review volumes were produced during both the 2020–2021 pandemic year and World War II. Then, in the entries that follow Dean Kearney's remarks, we present excerpts from a number of past Marquette Law School Faculty Blog items, expanding on the World War II era at the Law School, written by the late Prof. J. Gordon Hylton.

Joseph D. Kearney

Good afternoon and greetings to everyone. This gathering seems to me both a small thing and a large one: to be together with a group of students (outside of those with the good judgment to take one of my courses this year) and in fact to be with any nonfamily group for what amounts to a social occasion. Kudos to the leaders of the *Marquette Law Review* for taking the initiative as the pandemic recedes and we all try to “open up again” a little bit, subject to various protocols.

And kudos to all members of the law review for your work during the past year, in the most unusual and difficult circumstances of a pandemic. You do not need me to describe just what the circumstances involved, and in fact I am not quite sure how you have pulled it off. Here is what I *can* see: the fall and winter issues of volume 104 are now up on the website and available in print, and our editor-in-chief, Holly Stenz, reliably informs me that the spring and summer issues are not far behind. I also appreciate, from what is already in print, that it will be a high-quality volume.

And those things are enough for me, as a relative outsider, to know. The details of how you slogged through a pandemic, gathering sources and editing articles, are things with which

perhaps the Law School helped somewhat but that you sorted out for yourselves. This seems right: You are professionals, like past law students forming themselves into lawyers. You also have placed yourselves creditably in another worthy tradition, though a considerably narrower one, as editors and members of the *Marquette Law Review*.

This is a great tradition. I do not propose here to recount it in any detail, but I did spend a bit of time with your forebears, in preparing these remarks.

In particular, I looked at the volumes of the law review that this school—this journal—published during World War II. They are there for us: To this day, you can find the volumes on the shelves (and, of course, online).

Frankly, I have no idea how the editors and members then did it. Consider this brief and partial account by our wonderful former colleague, the late Prof. J. Gordon Hylton, about the World War II era at Marquette Law School:

World War II was hardly kind to the Law School, its enrollment quickly shriveling as potential law students found themselves in military uniforms.

During the 1940–1941 academic year, the Law School appeared to be prospering with an enrollment of 225 students

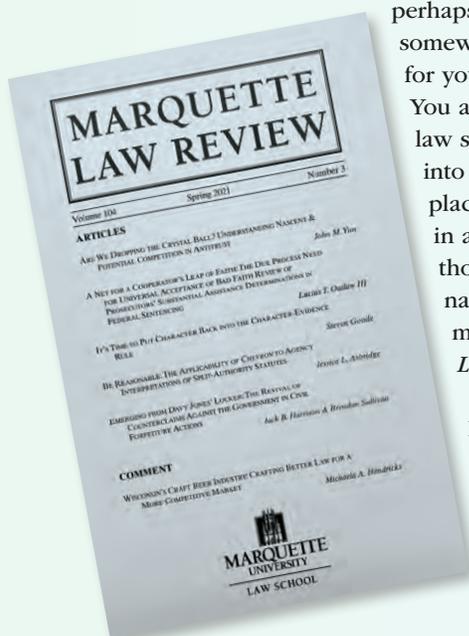
Although United States involvement in the war would not come until the Japanese attack on Pearl Harbor in December of 1941, the institution of the military draft and the darkening clouds on the horizon led to a decline in students in the fall of 1941, as the total enrollment dropped to 187 students. . . .

. . . .

By the beginning of the 1942–1943 academic year, the number of the students at the law school had dropped by more than 50 percent to just 85 students The situation got even worse after that, as enrollments for 1943–1944 and 1944–1945 were only 44 and 42 students respectively.

Professor Hylton has much else to say in his wonderful accounts, including the story of Clifford Thompson, a 1944 graduate who apparently was more than eight feet tall (you can find Professor Hylton's entries in various places on the Marquette Law School Faculty Blog). My primary point, though, has to do with the fact that, in the midst of this plummeting enrollment, the *Marquette Law Review* carried on.

We know this, even though we do not know how. The editors seem to have devoted no pages to an account of producing a law review with a skeletal staff, in the midst of the societal disruption caused by a world war. In the pages of



the journal, they left for us their professional work, not their personal accounts. There is a lesson in that, even as we might now wish to have the latter also.

Yet I have a strong intuition that, for themselves, they took away something else: friendships that for some of them lasted throughout their careers, even their lifetimes. When Tom Merrill, the Charles Evans Hughes Professor of Law at Columbia University, spoke at an end-of-year *Marquette Law Review* gathering a few years ago, as we approached the centennial volume, that is what he especially recalled about his own days, some 40 years earlier, on the *University of Chicago Law Review*. “Nearly all of my law school classmates with whom I stay in touch,” he said while here in Milwaukee, “are people with whom I served on the law review.”

Everyone’s experience is a little different, but I imagine that, for many of you, a similar thing will be true.

On a past occasion or two in your journal, I have had the privilege to reflect on its significance to the Law School. For example, a special issue of this journal, which I had the privilege to edit in 2002, was dedicated to the memory of the late Dean Howard B. Eisenberg. In the foreword to that issue, I looked back to the first page of the first *Marquette Law Review*, in 1916, where one W. A. Hayes, evidently a vice president of both the Wisconsin Bar Association and the American Bar Association, wrote as follows:

In giving the “Marquette Law Review” to the bench and bar of Wisconsin, the students of the College of Law of Marquette University have undertaken a most commendable work. The institution, like the individual, grows through its ideals and lives by its spirit. There can be no progress but through striving to reach the ideal. There can be no life, except the life of the spirit. But the institution which would expand and fulfill its mission must make known its ideals and communicate its spirit. The most effective way of doing both is by means of a suitable magazine. The “Marquette Law Review,” of which this is the first number, is such.

There are other ways that we make known our ideals and communicate our spirit at Marquette Law School, a considerably more expansive community than in 1916 or in the 1940s, but the law review continues to have a special place here. The way developing professionals come together to add to learning about the law sends a powerful message as to who we are and what we are about. Our successors will not know quite how you did it, 75 years from now, much more than we can reconstruct the processes whereby the journal persevered through World War II.

So, again, kudos and thank you to all of you. I hope that you will look back on your time on the *Marquette Law Review* as formative.

Speaking of Professor Gordon Hylton and World War II . . .

Dean Kearney’s references to Marquette Law School Faculty Blog pieces about the Law School in the World War II era, written by the late Prof. Gordon Hylton, lead us to offer some interesting and colorful excerpts from several of those pieces, lightly edited.

Marquette University Law School in 1939

Posted November 25, 2009

By 1939, Marquette University Law School had been training lawyers in Milwaukee for more than 45 years, and the school had been officially part of Marquette University since 1908. Since 1924, all law school classes had been taught at the Law Building (now known as Sensenbrenner Hall), which replaced an earlier building on the same site.

In 1939, the Law School boasted an enrollment of 248 students and a faculty of 10, plus 4 “special lecturers” and law librarian Agnes Kendergan. In addition, the Rev. Joseph A. Ormsby, S.J., served as the regent of the Law School. Although the school had originally offered instruction primarily in the evening, the evening division was terminated in 1924, and the last evening class was offered in 1927.

As an institution, Marquette University Law School was squarely in the mainstream of American legal education. The school had been admitted to the Association of American Law Schools in 1912, and in 1925, shortly after the American Bar Association (ABA) began to accredit law schools, it won ABA

accreditation. Historically, Marquette Law School graduates were required to take the Wisconsin bar examination to practice law in the state, but in 1933, after a long and sometimes bitter contest with the University of Wisconsin, the “diploma privilege” was extended to Marquette graduates.

Admission and Degrees: To secure admission to the Law School, applicants had to be 18 years of age and must have completed three years of college. There is no evidence that anyone who met these qualifications was turned down in 1939, but this was true for virtually every American law school before World War II.

Marquette students in 1939 had the option of pursuing two different types of law degrees—the bachelor of laws and the juris doctor. Marquette was one of several American law schools that offered the latter degree to provide recognition for students who entered law school with college degrees (which were required at only a handful of schools) and who performed extremely well while in law school. This two-law-degree program had been adopted at Marquette during the 1925–1926 academic year.

The standard law degree was the bachelor of laws (LL.B.), which was the equivalent of today's J.D. degree. To earn this degree, students had to complete 85 hours of law courses, including four hours of Office Practice and four hours of Moot Court, with an average grade of at least 77. (In 1939, the Law School was in the process of changing its grading system. The school had previously used the traditional letter system, but beginning with the class that entered in 1938 and for many decades, students were graded on a numerical basis ranging from 60 to 100. A grade of 93 or better was considered an A, and cumulative averages of 71 and 74 were required to continue after the first and second years, respectively.)

The second degree was the juris doctor, or J.D., degree. For it, students were required to have entered law school with an undergraduate degree, to complete the requirements for the LL.B. with an average grade of 88 (which was in the middle of the B range), and to prepare and submit an acceptable thesis by May 1 of their final year. The thesis, if accepted, became “the property of the School and at the direction of the Dean [could] be published.” By 1940, the J.D. was clearly passing out of fashion among Marquette law students. Although the degree was awarded to 67 students between 1926 and 1937, no one earned the degree in 1938, and the last two recipients received the degree in 1939. The J.D. degree remained on the books for several more years but was discontinued sometime between 1942 and 1945. (The J.D. would supplant the LL.B. at Marquette and across the country in the mid to late 1960s.)

The Academic Calendar: In 1939, the academic year started and ended much later than it does today. Law School classes did not begin until September 26, and the first-semester examinations did not end until February 2, 1940. The second semester began on February 6, with graduation on June 12.

Tuition for the regular academic year was \$230—although those who opted for payment on the installment plan had to pay an additional \$4—and board and lodging could be found in the vicinity of the Law School for an estimated \$7.50 per week. Third-year students who were also candidates for the law degree had to pay an additional \$12.50 diploma fee.

The Student Body: The 248 students enrolled at the Law School during the 1939–1940 academic year consisted of 76 seniors (third-year students), 72 juniors, 97 freshmen, and 3 special students. (Special students were enrolled in classes but were not candidates for degrees.) All 97 students in the freshman class were

male. There were two women in the senior class and three in the junior.

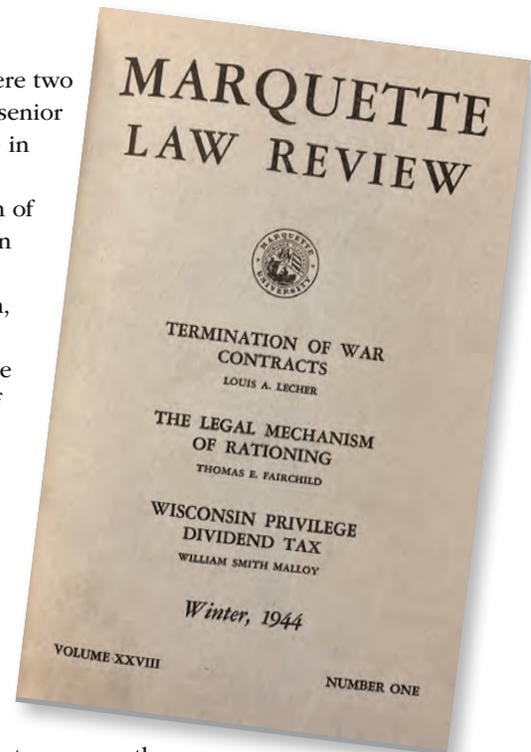
Eighty-seven of the 97 freshmen students were from Wisconsin, and 58 were from Milwaukee proper. Nine of the 10 out-of-state students were from the Midwest, including Jim Ghiardi, who was from Negaunee, Michigan, and who went

on to an eminent career on the Law School's faculty. The only student with a hometown outside the Midwest was Jim's future faculty colleague Ray Aiken, whose parents lived in Jacksonville, Florida. Only 18 members of the class were listed as having earned undergraduate degrees prior to beginning law school, although several, including Jim, earned their bachelor's degree at the end of their first year of law school.

The Law School Curriculum: The Marquette University Bulletin for 1939–1940 described the Law School's method of instruction as the “case method,” which it asserted “inculcates habits of accurate reasoning.” However, the same document also emphasized that the faculty neglected “neither the purely scientific nor the practical element of legal education” and noted that special attention was given to Wisconsin law.

To earn the law degree, students had to pass 85 credit hours of courses, most of which were required. All of the first-year classes—which included four yearlong courses and five that lasted one semester—were required and counted for 34 of the 85 credit hours. Each class was taught in a single section.

Students in the fall of 1939 had Dean Francis X. Swietlik for Contracts, Prof. Otto Reis for Torts and for Agency, Prof. J. Walter McKenna for Criminal Law and Procedure, Prof. Francis A. Darnieder for Introduction to Law, Prof. Willis E. Lang for Personal Property, and the Rev. Joseph A. Ormsby, S.J., for Natural Law and Jurisprudence. In the spring, Contracts, Torts, Criminal Law and Procedure, and Natural Law and



Jurisprudence continued with the same instructors. The final spring-semester course was Domestic Relations taught by Prof. Carl Zollmann. All of the professors, except for Rev. Ormsby, were full-time law professors.

Student Life: The only law school-specific activity listed in the Law School Announcement was the *Marquette Law Review*. However, law students were encouraged to take active interest in the university band, the university choir, the university chorus, the university symphony orchestra, intramural sports, and the various social, dramatic, literary, debating, and religious organizations. In a report to University President Raphael McCarthy, S.J., in 1939, Dean Swietlik noted that the Law School was concerned about the social life of its students and thus regularly sponsored “smokers,” annual dances including the Barristers Ball, and an end-of-the-year banquet for the law students, the faculty, the Milwaukee bar, and the Wisconsin judiciary.

Legal fraternities also played an important role in the social life of the Law School. Fraternities in 1939 included Delta Theta Phi, which had its own building, Phi Delta Phi, and Tau Epsilon Rho, a fraternity for Jewish law students.

According to the university yearbook, the *Hilltop*, “extracurricular activities [were] prominent in the law school,” and students were encouraged to participate “in organized religious and social movements for the common welfare of their fellows.” While the Law School acknowledged the importance of “the development of the social side of the student’s character,” its official publication cautioned: “No student activity is allowed to interfere with study.”

The Subsequent Law School Experiences of the Class of 1942: In spite of the reportedly grueling nature of the first year of law school, 90 percent (88 of the 97) freshmen students in 1939–1940 returned for their second year in the fall of 1940. A similar percentage of second-year students (79 of 88) returned for the third year of law school in 1941.

It was during a three-day break for the Feast of the Immaculate Conception during the fall semester of 1941 that Japan attacked Pearl Harbor. The likelihood of military call-ups prompted Marquette to accelerate its spring 1942 schedule, and in May, 69 members of the class received law degrees.

Marquette University Law School and World War II

Posted July 23, 2014

World War II was hardly kind to the Law School, its enrollment quickly shriveling as potential law students found themselves in military uniforms.

During the 1940–1941 academic year, the Law School appeared to be prospering with an enrollment of 225 students, all but eight of whom were males. (One of the male students was James Ghiardi, who was then a second-year law student.)

Although United States involvement in the war would not come until the Japanese attack on Pearl Harbor in December of 1941, the institution of the military draft and the darkening clouds on the horizon led to a decline in students in the fall of 1941, as the total enrollment dropped to 187 students. Female enrollment dropped from eight to six.

By the beginning of the 1942–1943 academic year, the number of the students at the Law School had dropped by more than 50 percent to just 85 students. The situation got even worse after that, as enrollments for 1943–1944 and 1944–1945 were only 44 and 42 students respectively.

To deal with the dramatically smaller classes, the Law School cut the size of its faculty and moved to a three-semester-a-year format that allowed students to complete the law program in just 24 months. Many of those who did enroll at the Law School during the war were ineligible for military service. For example, James D’Amato of Waukesha, at 5’1”, was too short for military service, while his classmate Clifford Thompson, who was reportedly more than 8 feet tall, was both too tall and too old to be drafted. Thompson, who had a successful career in Hollywood as an actor and as a performer with a number of circuses prior to law school, achieved the distinction of being the tallest lawyer in American history upon his admission to the Wisconsin bar in 1944.

One might have thought that the onset of the war would have led to an increase in the number of female law students, but that did not happen, as female enrollment amounted to only 5 students in 1943–1944 and only 6 in 1944–1945.

Moreover, the end of the war did not result in an immediate influx of new students into Marquette or other law schools. World War II did not officially end until the Japanese formally surrendered on September 2, 1945, and the logistics of demobilization made it impossible for many soldiers who wanted to pick up their lives by going to law school to enroll in time for the fall 1945 semester. But enrollment in 1945–1946 did increase from 42 to 93 (including 11 women). The following year, 1946–1947, saw the tide fully turned as 332 students, including 8 women, enrolled in the Law School, which at that time was a record for the institution.

Francis Swietlik, Marquette Law School, and Polish War Relief

Posted October 18, 2010

Francis X. Swietlik, dean of Marquette University Law School from 1934 to 1953, was a nationally recognized leader of the American Polish community from the early 1930s until the 1960s. During World War II, he was a leading figure in the effort to provide relief for Polish refugees and prisoners of war, and his efforts extended to the provision of general humanitarian aid to the country once the war was over. Although he initially cooperated with Poland's post-war Communist government, once it became clear that Poland had become a satellite state of the Soviet Union, he joined the ranks of those who campaigned for the restoration of a non-Communist, democratic government in that country.



Dean Francis X. Swietlik, ca. 1940.

Swietlik was born in Milwaukee in 1889 to parents who had recently emigrated from Poland. He was educated at Marquette, where he earned his bachelor's, master's, and law degrees. After graduating with the Class of 1914, he began the practice of law in Milwaukee, and in 1916, he joined the Marquette law faculty on a part-time basis. He taught at the Law School while practicing law for the next 17 years (save for the time he was in the military during World War I), and he was named dean in the fall of 1933, when the previous dean, Clifton Williams, resigned.

In 1931, Swietlik was elected censor of the Polish National Alliance, the largest Polish fraternal group in the United States. The censor was one of the organization's two highest offices—the president was the other—and was very much a policy-making position. Swietlik held the position of censor for 16 years, but at the same time held a number of

other important positions in the Polish American community. In 1934, he was selected vice-president of the Polish American Chamber of Commerce, and that same year he also presided over the American delegation to the International Congress of Poles Abroad, held in Warsaw. In 1939, he was also chosen as president of the Polish American Council, an organization founded to promote the preservation of Polish culture in the United States.

As a leader of the Polish American community and the man who was generally recognized as the primary spokesman for the Chicago Poles (which featured the largest concentration of Polish Americans of any region of the United States), Swietlik opposed those who insisted that Poles living abroad remained citizens of Poland, which reappeared as an independent country in 1918, after having disappeared from the map of Europe more than a century earlier.

Such Polish nationals believed that expatriate Poles were first and foremost Polish citizens, regardless of where they lived, and that as such they owed a duty of loyalty to the current Polish government. For Swietlik, in contrast, American Poles were Americans first and Poles second, and while he was proud of his Polish heritage (and was fully fluent in Polish), he believed that Poles in the United States owed no special obligations to the relatively new government in Warsaw.

After the German and Soviet invasions of Poland in September 1939, Swietlik became actively involved in the cause of Polish war relief, first as a leader of the Polish National Alliance and then as the director of the Polish National Council, which eventually changed its emphasis and name to Polish War Relief. By one estimate, Swietlik raised almost \$17 million in the United States for humanitarian aid to Poles in Europe.

Swietlik was also a prominent defender of the foreign policy of President Franklin D. Roosevelt. As a supporter of the president, Swietlik advocated American support for the Polish government in exile in London, but he also endorsed the idea of Polish-Soviet cooperation in the war with Germany. Not all Polish Americans agreed with Swietlik on the latter question. Although the government in exile also embraced the idea of cooperation with the Soviet Union, a growing number of American Poles found it troubling that the United States not only was allied with a country that had invaded Poland (the U.S.S.R.) but also was unwilling to pressure it to agree to reestablish the pre-1939 border between the two countries.

As the scope of atrocities committed against Poland by the Soviet Union became known in 1944 and 1945, and as it became clear that the U.S.S.R. was not going to return to Poland any of the territory that it had seized in 1939, many American Poles broke with Roosevelt. Swietlik, however, remained loyal to Roosevelt. He had supported FDR's decision to run for an unprecedented third term in 1940, and he campaigned extensively for him inside the Polish community. Swietlik also consulted personally with the president on Polish issues both before and after the 1940 election (which was, of course, won by Roosevelt).

By 1943, it was becoming apparent that Swietlik's loyalty to Roosevelt and his policies was hurting his popularity among his fellow Polish Americans, many of whom were increasingly hostile to what they viewed as FDR's pro-Soviet Polish policy. When the Polish American Congress was formed in the fall of 1944 with an agenda that was clearly hostile to the Soviet Union, Swietlik was conspicuously ignored by its founders, even though he had been one of the best-known Polish Americans in the country for the past several years (and even though he was present at the organizational meeting).

Although his political influence waned after 1944, Swietlik remained committed to raising money for relief of Poland. He traveled to Europe after V-E Day to survey the situation, and from 1945 to 1949 (when the Communist government of Poland announced that it would not accept any more humanitarian aid from the West), American Relief for Poland under Swietlik's direction raised at least \$3 million in aid. Remarkably, he accomplished all of this without ever taking a leave of absence from his duties at the Law School, which usually involved teaching a full load of courses.

In the aftermath of the war, Swietlik received numerous citations for his efforts on behalf of the Polish population. He was honored by the governments of Poland, France, and Portugal (where American Relief for Poland had staged rescue efforts after 1941), and in 1952, he was named a Knight of the Roman Catholic Order of St. Gregory by Pope Pius XII. He was also involved with the resettlement of 120,000 postwar Polish refugees into the United States, which had been made possible by an act of Congress in 1948. Although the organization was largely inactive after 1949,

Swietlik remained president of American Relief for Poland into the late 1960s.

In the postwar era, Swietlik also adopted a much more critical position on the Soviet Union and eventually denounced some of the policies of the Roosevelt administration that he had earlier supported. He remained dean at Marquette Law School until 1953, when he was elected to the Circuit Court of Milwaukee County. He continued to teach at the Law School, even after his retirement from the bench at age 70 in 1959. He died in Milwaukee in 1983.

The Law Professor Who Coached the Football Team

Posted January 17, 2017

Marquette University Law School has long been associated with the world of sports. Although the National Sports Law Institute has represented the connection in recent years, the school's relationship to the sports industry goes back much further than the 1989 founding of the institute. Federal Judge Kenesaw Mountain Landis, later the first commissioner of baseball, was a lecturer at the Law School shortly after it opened; Carl Zollmann, the first major sports law scholar, was on the Marquette law faculty from 1923 to 1940; and a number of outstanding athletes, including Green Bay Packer end (and future U.S. congressman) Lavvie Dilweg and Olympic Gold Medalist (and future Congressman) Ralph Metcalfe, studied at the Law School in its early years.



(From left) Frank Murray, Marquette football head coach, speaks with Charles Ellis, backfield coach, Ralph Heikkinen, line coach, and Robert Erskine, end coach, 1947.



Marquette University's Law Building (later renamed Sensenbrenner Hall), ca. 1940.

However, no one has ever combined the two fields more perfectly than Professor Ralph I. Heikkinen. During the 1947–1948 academic year, Heikkinen both taught full-time at the Law School and coached the Marquette varsity football team, at a time when the team played at the highest level of collegiate competition.

Heikkinen was already well known to sports fans in the upper Midwest when it was announced that he would be joining the Marquette faculty and staff in the spring of 1947. A native of the Upper Peninsula of Michigan, Heikkinen had grown up in the community of Ramsey. He had enrolled in the University of Michigan in the fall of 1935, where he excelled academically. Not only was he an outstanding student, but he was a published poet and the president of the student government. On top of that, he was an undersized lineman who made the powerful Michigan football team as a walk-on.

By the time he was a junior, Heikkinen had developed into one of the best two-way linemen in the country. Although just six feet tall and weighing only 183 pounds, he was voted as his school's MVP during both his junior and senior years and was chosen unanimously as a guard on the 1938 All-American team.

After completing his college career, Heikkinen was drafted by the Brooklyn Dodgers of the National Football League. Because of concerns over his size and the extent of his interest in playing professional football, he was not chosen in the 1939 draft until

the 12th round, the 105th overall pick. Finally, after accepting an invitation to play in the 1939 College All-Star Game, which pitted the top senior collegians against the NFL champion Washington Redskins, "Heik," as he was known, decided to sign with the Dodgers. However, the football success he had achieved in Ann Arbor was not to be repeated in Brooklyn. After only three games of the 1939 season (in only two of which he actually played), the Dodgers released Heikkinen.

Within three weeks, Heikkinen was in Charlottesville, Virginia, where he accepted a position as assistant line coach for the school's football team, which was coached by former Marquette head coach Frank Murray. At the same time, he enrolled as a first-year student at the University of Virginia School of Law, even though the fall semester was already underway.

In 1940, he was promoted to head line coach at Virginia, a position that he would hold for the next five seasons. When not coaching the Cavaliers, Heikkinen divided his time between his legal studies and his involvement with the University of Virginia's flight preparatory school, which was established as part of the United States Navy's V-12 program during World War II.

Heikkinen excelled academically. When he graduated, he ranked number one in his class. After graduating from law school in June of 1944, Heikkinen remained on Murray's coaching staff. However, at the conclusion of the 1944 season, he announced his decision to accept an associate's position with the New York law firm of Cravath, Swaine & Moore.

Following the 1945 season, Coach Murray left the University of Virginia and returned to Marquette University, where he already was a legendary figure. During his time as the head football coach of Marquette from 1922 to 1936, the Golden Avalanche/Hilltoppers compiled a won-lost record of 90-32-6, culminating with an appearance in the inaugural Cotton Bowl during Murray's final game at the helm. In 1946, Murray was enthusiastically welcomed back to Marquette.

During Murray's first season after his return, the Golden Avalanche went 4-5-0. At the conclusion of the season, head line coach Al Thomas stepped down. To replace Thomas, Murray convinced Heikkinen to return to coaching. Heikkinen was initially reluctant to return to coaching, but Marquette sweetened the pot by offering Heikkinen a full-time position as associate professor of law as well as that of Murray's chief assistant with the football team.

Murray suffered a heart attack in the spring of 1947, which required his role to be reduced for the rest of the calendar year. As a result, Heikkinen was offered the chance to run the football team's spring practice in April and to coach the team from the bench during regular season games in the fall (although Murray officially remained the head coach). Heikkinen accepted the position, with the stipulation that he would be allowed to retain his New York affiliations and would be free to return to New York at the end of the 1947–1948 academic year, if he chose to do so.

The addition of Heikkinen brought the Law School faculty to 15, which included eight full-time professors. In addition, the faculty included seven part-time lecturers and instructors, and a regent, Rev. Edward McGrath, S.J., a Jesuit who was also a professor of jurisprudence. The most prominent of the part-time faculty was Milwaukee lawyer Carl Rix, who taught Property and who was wrapping up his term as president of the American Bar Association.

Heikkinen taught a variety of courses, but he specialized in corporations and security transactions. He was also quite conscientious when it came to making sure that his coaching duties and opportunities did not interfere with his classes. Shortly after he joined the faculty in the summer of 1947, he declined a much-coveted invitation to coach the North team in the Upper Peninsula High School All-Star Football Game because it would have required him to cancel some classes. During several away games during the football season that fall, Coach Heik had to follow the team in a later train, and in one case take an airplane, to avoid missing any classes.

Under the joint direction of Murray and Heikkinen, the 1947 Marquette football team got off to a roaring start, defeating South Dakota, St. Louis University, and the University of Detroit in its first three games by a combined score of 101 to 47. The winning streak came to an end, however, in game four, when the Hilltoppers lost in Milwaukee to another Jesuit school, the University of San Francisco, 34–13.

The next week featured the game that most Marquette fans felt was the most important of the season, the annual matchup with the University of Wisconsin in Madison. Marquette fans seemed confident that this could be one of the rare years that the Catholic school might defeat the state university. But the Badgers won 35–14.

The suddenly dispirited Hilltoppers proceeded to lose their next three games to Michigan State, Villanova, and Indiana, all of which had winning

records in 1947. The team finally rebounded in its last game of the season, which required it to travel to Phoenix the weekend before Thanksgiving. There, it defeated the 5-2-0 Arizona Wildcats.

Following the end of the football season, Heikkinen continued as a faculty member at the Law School, and most members of the school community assumed that he would remain at Marquette the following year. He participated in the spring football practice in late April of 1948, and several newspapers reported that he would be part of the Marquette coaching staff in 1948. However, in August, the university announced that Heikkinen had resigned both his teaching and coaching positions to return to law practice in New York. According to Heikkinen's friend, Professor Jim Ghiardi, in a 2014 interview, no one at Marquette ever knew exactly why Heikkinen decided to leave.

Shortly after his return to New York, Heikkinen became the executive secretary and attorney for the Studebaker-Packard Corporation, an automobile company that had been a Cravath client. In 1958, he left Studebaker to work in the legal department of General Motors, where he remained until his retirement in 1978. After leaving Marquette, he never again worked as a football coach.

Heikkinen died in Michigan in 1990, where he lived in the Detroit suburbs.

Heikkinen was not the only combination football coach and law professor in American history. Lawyer and Hall of Fame coach Daniel McGugin coached the Vanderbilt football team and taught occasional classes at the Vanderbilt University law school during the first three decades of the 20th century. Similarly, Fred Folsom taught part-time at the University of Colorado law school while coaching the school's football team from 1908 to 1915. However, Heikkinen was a full-time law professor, and he managed to hold both positions in the post-World War II era, when both coaching and law teaching were more demanding tasks than they had been forty years earlier.

Since it appears that Heikkinen is the only person to be a full-time major college football coach and full-time law professor at the same time, it is entirely appropriate that he accomplished this distinction at Marquette University, where the connection between law and sports has long been recognized. ■

Historical images in this article and on page 3 of this issue are provided by the Department of Special Collections and University Archives, Raynor Memorial Libraries, Marquette University.

CELEBRATING THE CAREERS—AND UNVEILING THE PORTRAITS—OF **PROFESSORS CAROLYN EDWARDS and PHOEBE WILLIAMS**

On April 14, 2021, Marquette University Law School unveiled the portraits of two retired faculty: Professor Carolyn M. Edwards and Professor Phoebe Weaver Williams, L'81. While the event was online, the portraits are on permanent display in Eckstein Hall. Their significance—reflecting the importance of the individuals portrayed—was suggested in the remarks at the event, which appear here lightly edited.



Professor Carolyn M. Edwards



Professor Phoebe Weaver Williams

Dean Joseph D. Kearney

Good afternoon, and welcome, everyone, to Eckstein Hall, if you will. We are expecting more than 200 people today, and I appreciate that many of you are joining us from elsewhere. Our gathering embraces faculty, alumni (Marquette lawyers, as we tend to say), retired administrative assistants, current students, and even a prospective student or two, scarcely to encompass all the examples. You include three trustees of Marquette University—Justice and Professor Janine Geske, Ray Manista, and Judge Jim Wynn. Some of you are as far away as Michigan, North Carolina, Florida, Texas, New Mexico, and California, just to go rather quickly around the country.

Yet our *geographic* focus today is on Milwaukee—here in Eckstein Hall. We all know it to be an important and magnificent building—not just an elegant venue, but a dynamic educational home, in part because of the social interaction that it engenders. In fact, much better than many public buildings, Eckstein Hall has supported such interaction even during the pandemic of this past year.

Inside this newish building, barely a decade old, one sees our century-plus history as well. In our first-floor Lubar Center, one is greeted by portraits of Marquette lawyers or faculty who served on a state supreme court or a federal court of appeals, going as far back as Justice Franz C. Eschweiler, more than a century ago. In perhaps the Law School's longest tradition of this sort, each of the former deans can be met in a portrait in one place or another in the building. Several past presidents of the university welcome you, in a sense, to the third floor of Eckstein Hall.

Aspects of our portrayals reflect considerable diversity, beyond ranging from Ray and Kay Eckstein on the first floor, to Abraham Lincoln in the Aitken Reading Room on the third floor, to St. Edmund Campion in the chapel on the fourth. The striking *Marquette Lawyer* covers, going back almost 20 years, line the hallways on the second floor along the Zilber Forum and elsewhere,

showing people who have graced our community, in any number of different ways, whether during a lifetime or through an important lecture appearing in the *Marquette Lawyer* magazine. In addition to the late Chief Justice Shirley S. Abrahamson and Justice Antonin Scalia at the dedication of Eckstein Hall in 2010, and Rabbi Aaron D. Twerski, of our Class of 1965 and a great scholar of the law, one will pass Ralph Jackson, the architect of this building; Judge Albert Diaz of the Fourth Circuit; our five African American alumni who helped diversify the Wisconsin state trial courts in the 1990s and the next decade; and a number of others, such as (most recently) Professor Paul Butler, my fellow South Side Chicagoan and a professor at Georgetown University.

To leave aside those who served as a judge or as dean, one will meet a handful of past faculty of Marquette Law School, including the late Professors Francis A. Darnieder and James D. Ghiardi. Behind each portrait is a story: For example, while we were still in Sensenbrenner Hall, my colleague, now-emeritus Professor Jack Kircher, and his wife, Marcia, donated the portrait of Professor Ghiardi, who was both Jack's mentor and the most renowned professor among generations of Marquette lawyers. In the case of Professor Darnieder, the portrait was a gift of the Class of 1963, after his death the year before—it was from his students, that is to say.

It is within *all* this context that another of my colleagues—Professor Michael K. McChrystal—urged upon me that the Law School commission portraits of two of our emeritae faculty: Professors Carolyn Edwards and Phoebe Williams. Mike, himself a member of our Class of 1975, urges many ideas upon me. I once introduced him to Ray and Kay Eckstein, as we stood on the future site of this building, as the person who had gotten me into “all this trouble” (whereupon, to Mike, I introduced Ray and Kay as the people who had gotten me out of the trouble). As often, Mike's urging was

“One student particularly liked Professor Edwards’s humor in demonstrating the wide variety of ways to accept a contract offer—by having a student signify acceptance by singing a song.”

JOHN A. ROTHSTEIN

somewhat contrary to his own interests, in the sense that he made clear from the outset that he would fully underwrite this project.

With his permission, I will read you some of what Professor McChrystal said to me. He captured it well:

Carolyn and Phoebe were trailblazers, creating paths for so many other talented teachers and students. It wasn’t easy for either of them; like most trailblazers, the resistance they faced was formidable. But their knowledge, perseverance, and incomparable dignity won over some, then many, then pretty much everyone. I saw this firsthand as a colleague, and secondhand through my own children as Marquette law students, and now as Marquette lawyers, who single out these outstanding teachers from their law school days. Marquette, named for another trailblazer, exhorts us to *be the difference*. Phoebe and Carolyn have made a lasting difference during their long and distinguished careers on the law faculty. *They are Marquette* for thousands of alums and members of the community. Their portraits gracing Eckstein Hall will proudly proclaim that fact for decades to come.

We discussed this project as long ago as 2018 and set out upon it in 2019, but events intervened (not least the pandemic and the existential imperative that it posed). Now we are ready to proceed, and we see not enough reason to wait until we can all assemble in person. Many of us are in Eckstein Hall every day, and it is right that, being now available, the portraits of Professor Edwards and Professor Williams—and both of these colleagues are at this event today—should be placed alongside that of Professor Ghiardi, whom I have already mentioned, and one of Professor Ken Luce,

which has been part of the Law School since 1977. For that to happen, the new portraits must be unveiled.

Toward that end, while we embrace that a picture is worth a thousand words, we have asked two colleagues to speak briefly concerning each of the honorees and of her significance to them. The speakers are, in each case, a current faculty member and a former student (a Marquette lawyer). I refer to them all as colleagues, of course, because we are all members of a common profession.

Both alphabetical order and date of hire support our unveiling the portrait of Professor Edwards first and then that of Professor Williams. And in the first regard, we have asked Professor Judith McMullen and John Rothstein to speak concerning Professor Edwards. Professor McMullen is herself a longtime member of our faculty, having started teaching here, at her hometown law school, in 1987. Mr. Rothstein is a member of our Class of 1979 and a longtime partner at Quarles & Brady in Milwaukee. After their remarks, I will come back on screen, not for my own sake but in order that we may show the portrait of Professor Edwards.

Without more, Professor McMullen.

Professor Judith G. McMullen

Thank you, Dean, and good afternoon, everyone. It is my privilege today to say a few words about my colleague and friend, Professor Carolyn Edwards.

Carolyn Edwards was born and raised in Ohio. She graduated from Wells College in Aurora, New York, where she majored in philosophy and was a member of Phi Beta Kappa. After graduation, she was a Woodrow Wilson Fellow in philosophy at the University of California-Berkeley.

Following Berkeley, Professor Edwards returned to Ohio and taught fifth and sixth grade for four years while she attended the University of Toledo College of Law in the school’s part-time evening program. One

measure of the extreme difficulty of doing this is that of the 68 students who began the night program, only 12 graduated in four years: 10 men and 2 women. After her graduation in 1970, Professor Edwards spent nine months looking for a legal job, challenged by the fact that employers were open about not wanting to hire women. One male lawyer told her, “We’re a very clubby group here, and you wouldn’t fit in.” Undeterred, Professor Edwards accepted a position with the Ohio Insurance Commission and moved to Columbus, Ohio, to work as an attorney examiner.

Carolyn Edwards always aspired to teach law, so after a couple of years with the Insurance Commission she accepted a full-time job at The Ohio State University teaching business law to undergraduates. During her second year at Ohio State, she received a letter from one of her professors at Toledo, encouraging her to apply for teaching positions at law schools. So she did.

Marquette interviewed her and quickly had the good sense to hire her. Carolyn Edwards began teaching at Marquette in 1974, when Robert Boden was dean, thereby becoming the first woman to be hired at Marquette as a full-time, tenure-track law professor.

During her time at Marquette Law School, Professor Edwards has focused her teaching and scholarship on the law of contracts, sales, secured transactions, and negotiable instruments. She shared her love (yes, she uses that word) of contracts and Articles 2 and 9 of the Uniform Commercial Code with more than a generation of law students. The steady stream of students coming to her office for individual conferences over the years is testimony to the care and attention she paid to her students throughout her career. Professor Edwards also published scholarship on commercial law. For example, her article, “The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel,” was cited in the *Restatement (Second) of Contracts*, a leading authority. Other articles, such as “Article 2 of the Uniform Commercial Code and Consumer Protection: The Refusal to Experiment,” were cited frequently by leading commercial law scholars.

Over the years, Professor Edwards engaged in significant service work at the law school, university, legal profession, and larger-community levels. She has served multiple years on virtually every significant law school committee, often as chair. In addition to her service at Marquette, some examples of service activities undertaken by Professor Edwards both within the legal profession and within the larger community include service on the Wisconsin court system’s Judicial

Education Committee, as well as more than 20 years of dedicated service on the board of directors of the Legal Aid Society of Milwaukee.

Of course, Professor Edwards has always been smart, dedicated, and hardworking. Equally important, she has served as a role model for a generation of female law students and colleagues (like me). Carolyn Edwards has shown us how to be intelligent and strong without being condescending, defensive, or abrasive. She has consistently shown us that we can all belong and make an impact in the legal profession if we work hard and are respectful of others. The qualities that make Professor Edwards an excellent teacher also make her a wonderful colleague and friend: she is interested in and attentive to people, patient with others, clear and unpretentious in her speech, and appreciative of the good in the world.

Carolyn Edwards recently said to me that, as she looks back on her career as a woman in the legal profession, she sees that there were hurdles, but she appreciates that there was also a lot of support, from both men and women, along the way. Thank you, Carolyn, for providing that same support and encouragement to those of us who are trying to follow in your footsteps. We are so grateful to have you as our teacher, our colleague, and our friend.

And with that, I will turn to John Rothstein, who has some remarks.

John A. Rothstein

Thank you, Dean Kearney and Professor McMullen. I started Marquette Law School in 1976 and graduated in 1979. Despite the many years that have passed since my time in school, I still remember the professors who touched my life. I suspect we all do. We remember how they challenged us, pushed us, encouraged us, and taught us the way we needed to think to become lawyers.

For me, Carolyn Edwards was one of those formative professors. She was my professor for Contracts and for a course in the Uniform Commercial Code. To explain why she was so formative, let me set the stage.

In 1976, a very popular movie (and then TV show) was titled *The Paper Chase*. The movie centered on an imposing faculty professor, named Charles Kingsfield (played by actor John Houseman), who taught Contracts to first-year students. One of the main dramatic tensions in the movie was how many students would survive the workload and learn the essential analytical skills needed to flourish as a lawyer. Of course, in “reality,” the fictional Professor

Kingsfield—despite his intimidating persona—had a heart of gold. With this Hollywood image in my mind, I came to my first days at Marquette Law School.

With one exception, for at least the start of that first semester, I experienced some of the same worries that the movie so ably portrayed. The main exception was Professor Edwards. With her measured manner, Professor Edwards quickly made evident that she had all the same precision and expertise as the fictional Professor Kingsfield, but without the distance or mystery. To me, she was a professor who not only imparted the needed information but did this in such a fashion that I knew innately she was out to help every student. It was simply her character.

In preparing these comments, I visited with various of my classmates, to recall their own experiences with Professor Edwards. Their memories were the same. The words they used to describe Professor Edwards were “helpful”; “nuts and bolts”; “plainspoken”; and “kind.” One classmate summed it up this way: “The first two years of law school were frenetic. But Professor Edwards was always a calming influence.”

Because character is often said to be destiny, I was equally unsurprised when I received virtually identical reviews of Professor Edwards from much more recent Marquette law students. The comments I got from them were along these lines: “I was super nervous, but she put me at ease.” “She is all business.” “She got me engaged.” One student particularly liked Professor Edwards’s humor in demonstrating the wide variety of ways to accept a contract offer—by having a student signify acceptance by singing a song.

John Houseman, the fictional professor in *The Paper Chase*, received an Academy Award Oscar for his portrayal of that foreboding but caring Contracts professor. That award, though well deserved, was for work in one movie depicting the passage of but one school year.

Professor Edwards, in contrast, has been conducting the real-life version of that work for more than 45 years. While the memory of *The Paper Chase* is now fading, I know that generations of Marquette lawyers will remember forever the service that Professor Edwards rendered to them. In whatever may be their field of endeavor, they are all better lawyers and better people for the care and effort she gave them. I certainly am.

So, thank you, Professor Edwards, for your years of service, and I offer you the warmest congratulations on this well-deserved recognition. Whether you wish to signify your acceptance by singing, I leave to you.

Dean Kearney

Thank you, John (and Judi). I appreciated your remarks very much. Let us now display the portrait of our colleague and friend, Professor Carolyn Edwards.

We will see it again briefly at the end of the program—for a particular reason—and we and future generations will see it, each day, in Eckstein Hall.

Let us now turn our attention to Professor Phoebe Williams. Professor Vada Waters Lindsey and Kate McChrystal have agreed to speak. Professor Lindsey, a professor of law who has been serving more recently also as our associate dean for enrollment and inclusion, has taught at the Law School for 25 years. Ms. McChrystal is a member of our Class of 2010 and a partner at Gagne McChrystal De Lorenzo & Burghardt, here in Milwaukee. After their remarks, we will unveil the portrait of Professor Williams. Then we will have brief, almost-closing remarks by our provost, Kimo Ah Yun.

Professor Vada Waters Lindsey

Thank you, Dean Kearney. It is my pleasure—indeed, my honor—to share a few remarks about Professor Phoebe Weaver Williams. Professor Williams, who grew up in Memphis, received her undergraduate degree from Marquette University. After her graduation in 1968, Professor Williams held various leadership positions during a 10-year career at the Social Security Administration.

While Professor Williams had thought about becoming an attorney when she was a child, her work at the Social Security Administration solidified her interest. As a result, she enrolled in law school at Marquette and earned her J.D. in 1981. She went on to practice labor law at a local law firm before joining the Marquette Law School faculty as an assistant professor of law in 1985. She was promoted to associate professor of law with tenure in 1992. Not only was Professor Williams the first tenured African American professor at the Law School, but she was also the first tenured African American professor at Marquette University as a whole. She was a true trailblazer.

Before taking emerita status in 2014, Professor Williams taught many classes at the Law School, including Labor Law, Business Associations, Employment Discrimination, and History of Women Lawyers.

Professor Williams was always willing to devote her time in service to the Law School, university, legal profession, and community. For example, she was the Black Law Students Association’s faculty advisor for 15 years. She chaired the Marquette University Task

Force on Gender Equity. She was a member of the State of Wisconsin Governor's Task Force on Racial Profiling. She was a member of the City of Milwaukee Fire and Police Commission, including serving as the vice chair and then chair. Professor Williams was also a court commissioner of the Milwaukee County Circuit Court, and she served as a member of committees to review four nominations to the U.S. Supreme Court. Significantly, the individuals who turned to Professor Williams for these appointments included a mayor, judge, governor, and U.S. senator.

Professor Williams's impact continues as an emerita professor. For example, her 2009 article entitled "Age Discrimination in the Delivery of Health Care Services to Our Elders" was recently listed on SSRN's Top Ten download list in aging and long-term care, access to health care, and social determinants of public health.

On a more personal note, I would not be the professor that I am today without Professor Williams's guidance, support, and friendship. As a junior faculty member, when I sought her counsel, she was always available. I learned a great deal from her about professionalism and collegiality. She always greeted me with a warm smile. And, as I often saw, she had that same smile as she interacted with the students. She embraced *cura personalis* in these interactions. I recall several years ago when a student from a southern state did not have a winter coat. She drove that student to Mayfair Mall so that the student could get a suitable winter jacket.

In conclusion, on behalf of our faculty colleagues at the Law School, past and present, I feel confident in conveying how proud we are of Professor Williams on this well-deserved honor.

Let me now pass the virtual microphone to Kate McChrystal.

Kate McChrystal

Thank you, Professor Lindsey, and thank you, Dean Kearney. I was incredibly fortunate to have Phoebe Williams as my professor, right at the point in law school where I was wondering if I had made a terrible life decision.

Professor Williams's class that semester—History of Women Lawyers—was unlike any other in my law school experience. It was a place where we were encouraged to consider our own vision of our careers and to discuss our fears and our hopes and how we would conquer or pursue them. Professor Williams created a safe, supportive, and open space for discussion about the law but also about our lives.

Her class was the first place in law school where I heard about various career paths in real terms, with real experiences—not just war stories, but life stories, about how women lawyers had paved their own way since the inception of modern lawyering and about how we are each empowered and able to do that for ourselves.

It is no surprise that it is Professor Williams who created that space and opened that discussion. Professor Williams herself has set such a lovely example in her real life—balancing a successful career, really important community activism, and a satisfying family and social life. She has shown us, and shows us, that we can have it all, if we are willing to pave our own path and—maybe even more importantly—create our own boundaries.

Professor Williams, please know that *your* class and the discussion that you led there gave me both the permission and the road map to create a law practice that fits my own needs. I'm eternally grateful to you for seeing the need for that type of course and for making it such a critical piece of my law school experience. I think back on our discussions regularly—in my professional life and in my personal

“Professor Williams’s class that semester—History of Women Lawyers—was unlike any other in my law school experience. It was a place where we were encouraged to consider our own vision of our careers”

KATE McCHRISTAL

life—when I say “Yes” to opportunities, and when I confidently decline. Thank you, Professor Williams, for giving me and so many students the permission to make our own way.

We are all so happy to honor you formally today and to honor your spirit in our daily lives, our community work, and our law practices. Congratulations on this well-deserved honor.

Dean Kearney

Thank you, Kate (and Vada). I am very grateful for your very fine comments. It is now time to unveil the portrait of our colleague and friend, Professor Phoebe Williams. This, too, will welcome students and visitors to Eckstein Hall, for years to come.

We have some almost-closing comments from the university’s chief academic officer, Provost Kimo Ah Yun.

Provost Kimo Ah Yun

Thank you, Dean Kearney, and congratulations to Professors Edwards and Williams. I get a lot of opportunities to walk around campus, and I get to see various portraits that are hung at Marquette. There is not an extraordinary number, but I think about the impact that those portrayed—and others also—have left on this university. A portrait becomes a permanent trace of those who have made Marquette a very special place.

I am so happy that your portraits will be in Eckstein Hall. Our mission statement declares that “Marquette University is a Catholic, Jesuit university dedicated to serving God by serving our students and contributing to the advancement of knowledge.” When we think about who we want to be as Marquette University, we talk about building men and women for and with others. We’ve been doing that for more than 140 years, and that can’t be done unless we have dedicated faculty—which is exactly what we have here.

When I was listening to all the presenters talk about Professor Edwards and Professor Williams, certain words popped out: *care, attention, impact, patient, expertise, kind, helpful*—those are all great, and that’s always what we’re trying to do. But of all the words that I heard, the one that made me most grateful to be part of Marquette is *love*. When we love our students, we make a difference, and I hear that weave through all of the stories.

So on behalf of Marquette University, Academic Affairs, the Law School, and all the students that you have touched in your many years at Marquette University, thank you for making our university better.

I feel honored that you chose Marquette to be the place that you could be a difference-maker for everyone. Again, thank you and congratulations.

Dean Kearney

Thank you, Provost Ah Yun. Let us to do two more brief things. First, I mentioned that Professor Edwards and Professor Williams are both with us today. I understand that they want to say something—not a rebuttal, I imagine, but it is not for me to say. Let’s go first to Professor Edwards.

Professor Carolyn M. Edwards

Thank you, Dean Kearney, and good afternoon to everyone. First of all, I’m a bit—well, more than a bit—overwhelmed by this honor. So I’m going to read my comments, if you don’t mind.

I’m very grateful to everyone who made today possible and, in particular, to Professor Mike McChrystal, a *longtime* colleague of mine, and of course to Dean Kearney, who provided wonderful support. I do want to give thanks as well to John Rothstein and Professor Judith McMullen.

John entered law school shortly after I began teaching. He was a joy to have as a student. He was dedicated to learning but fun loving at the same time. And from what I understand, he’s continued those qualities long into his career at Quarles & Brady.

Judi has been a colleague and a friend for many years. To put it in a nutshell, I treasure her friendship. We spent many hours together, in our offices, which were usually just a few feet apart, discussing everything from how to write a syllabus to how best to give exams. But mostly we concentrated on the world’s problems, and we were sure that we came up with solutions. Of course, no one listened to us, you will permit me wryly to say, but we continued our examination, in the hopes that someday someone might follow through. Again, I very much treasure her friendship.

Teaching at Marquette has been a dream come true, believe me. I will always be grateful to all the students for keeping this dream alive. I think I received more from the students than I ever returned to them. It’s wonderful to see so many of my former students attending today’s event. Thank you, everyone—I am deeply honored by this event, and I can’t ever find the words to say that as clearly as I would like. Thank you so much, and back to Dean Kearney.

Dean Kearney

Thank you. And Professor Williams.

Professor Phoebe Weaver Williams

Thank you, Dean Kearney. I really appreciate this honor, and sharing it with my colleague, Professor Edwards, is very special. Through her excellent teaching, she opened the door for women faculty, including one of my mentors, Professor Christine Wiseman.

Professor Lindsey and Kate McChrystal, thank you for your remarks. They remind me that I've really been blessed to have some wonderful and amazing students and talented colleagues. I want to thank as well Professors Jay Grenig and Ralph Anzivino, who also served as mentors and supported me in my efforts.

And thanks to Professor Mike McChrystal, for the very special way that he contributed to this project and for the way he supported *each* phase of my professional career, from law student to emerita professor. Associate Dean Christine Wilczynski-Vogel, thank you for your excellent organization and support during the planning of this event.

Whatever I did to deserve this honor, I have had resources of perseverance. Those resources to persevere have included my family and my friends.

My parents, Alonzo and Claribelle Weaver, are no longer with us, but they were exemplars of perseverance. For most of their careers as educators, they had no legal protections against racial discrimination. Our racially segregated community denied them access to the local university. Yet Mom and Dad pursued graduate degrees during summers by attending a historically black university located three hours from our home. For many years, they earned less than the white teachers in our community, yet they were generous in sharing their

time, talent, and resources. My sister, Phyllis Weaver, and brother, Alonzo Weaver, have also continued my parents' tradition in their careers while serving their communities.

My husband, Willie L. Williams, of 32 years, is with me today: a decorated Vietnam veteran, he's encouraged me to persevere, with courage. Our children have joined us today, along with our son-in-law and granddaughter, and I'm happy they are here.

There are friends and family—and friends who are like family—who have supported my journey. I'm so grateful for your presence. You have literally fed my soul. You lifted me up when I was down. You shared your energy with me when I was tired. You know who you are, and I thank God for you.

And thanks again to my Marquette family—my law school classmates, who I know are here; Dean Kearney, former students, faculty colleagues, and staff: Each of you in some way helped me to become a better teacher and a better person. Thank you very much.

Dean Kearney

And thank you to all who have been here today. As we leave one another, it seemed to us that everyone might like to see the portraits in context. You can do that any day, starting tomorrow, on the third floor, just to the left of the portraits of Professor Ghiardi and Professor Luce. With the sneak preview of a sort on your screen right now, you can see that, in fact, the portraits of Professor Edwards and Professor Williams will be visible from a number of places in the building, to passersby in this prominent hallway and, more generally, through the glass of the forum. Come and visit them—and us. Thank you. ■



CLASS NOTES



Kathleen Callan Brady



Agbai I. Obasi



Annette Kingsland Ziegler



Schuyler J. Baehman



John T. Reichert



Eric R. Wimberger

68 Joan F. Kessler was appointed a member of the Milwaukee Fire and Police Commission by Mayor Tom Barrett. Kessler is a retired Wisconsin Court of Appeals judge, retired partner at Foley & Lardner, and former U.S. Attorney for the Eastern District of Wisconsin.

71 James A. Spella received the Young Lawyers Division Mentoring Award from the State Bar of Wisconsin. The award is designed to pay tribute to a Wisconsin attorney who has made an exceptional contribution to the life and career of a young attorney.

74 Kathleen Callan Brady received the Distinguished Alumna Award from her alma mater, Saint Mary's College, Notre Dame, Ind. Brady is currently the fund-raising and development consultant for Metcalfe Park Community Bridges in Milwaukee.

84 The Rev. Clifford R. Haggens, Jr., was appointed by the Roseville City Council (Calif.) to a four-year term on the Roseville Planning Commission. He continues to serve as secretary and board member of The Gathering Inn, a nonprofit organization serving the homeless throughout Placer County, Calif.

86 Agbai I. Obasi published a book, *Financial Independence: Lessons on Financial Freedom (Based on True Life Stories)*. He has also published *Nigeria: A Decade of Sycophancy, Waste, and Looting of Public Funds (1999–2009)* and *Nemesis: An Insight into the Root Causes of Bank Crisis in Nigeria*.

89 Annette Kingsland Ziegler was selected by the Wisconsin Supreme Court's justices as the new chief justice. Ziegler was first elected to the Supreme Court in 2007 and was reelected in 2017. The chief justice's term runs two years.

93 Greg I. Devorkin and his family developed All Star Health Center, a nonprofit organization based in the Milwaukee area, whose goal is to facilitate the mental, emotional, and physical health of individuals with disabilities while empowering each person to become a star.

Terry J. Gerbers started a new position as managing partner at DeWitt LLP's Green Bay office. He serves as corporate counsel to several small and midsize businesses.

Timothy S. Trecek, of Habush Habush & Rottier in Milwaukee, was awarded the Tommy Malone Outstanding Verdict Award by the Litigation

Counsel of America. The award is presented annually to recognize a trial verdict of an extraordinary nature, whether in the magnitude of amount or in the significance of the underlying law and facts presented. It was based on Trecek's having secured, on behalf of a client in 2020, a verdict of \$38.16 million from a Racine County jury—the largest single plaintiff's personal-injury compensatory verdict in Wisconsin history.

98 Kimberly R. Walker is the new chief legal officer at Racine Unified School District.

99 Mary T. Wagner's latest Finnigan the Circus Cat chapter book, *Finnigan the Lionhearted*, won first place in the "Book Design" category of graphics and design in the Illinois Woman's Press Association annual communications contest and third place in the National Federation of Press Women's contest.

00 Schuyler J. Baehman was named vice president of communications of Southern Equity Company. He joined the company in 2017.

02 John T. Reichert was elected to the board of directors of Reinhart Boerner Van Deuren, Milwaukee. Reichert is a shareholder in the firm's banking and finance practice, where he provides a wide array of general

advice and counsel to banks, bank holding companies, and other companies involved in the financial services industry.

04 Raeshann D. Canady was named director of Nevada Impact for the nonprofit organization Leadership for Educational Equity, which aims to involve civic leaders in addressing educational inequity.

05 Laura M. Lyons, of Madison, Wis., joined SECURA Insurance as a claims attorney.

Eric R. Wimberger was elected a Wisconsin state senator, representing the 30th Senate District, in northeastern Wisconsin.

08 Melissa J. Papaleo was promoted to partner at Halling & Cayo, Milwaukee.

09 Alfredo M. Cantoral was named assistant general counsel and head of legal for the investments group at American Equity, an Iowa-based insurance company.

Ari B. Lukoff took a position as Corporate IP Counsel for the paint business of Sherwin-Williams, which is headquartered in Cleveland, Ohio.



Dotun O. Obadina



Lindsey A. Kujawa



Makda Fessahaye



Kristen D. Hardy



Jared D. Widseth



Amanda P. Luedtke

Nathan A. Petrashek was appointed as staff attorney to District II of the Wisconsin Court of Appeals, based in Waukesha, Wis. He also welcomed a son, Jack, on February 1, 2021.

10 Michelle L. Velasquez received the Dan Tuchscherer Outstanding Public Interest Law Attorney Award from the State Bar of Wisconsin. The award is presented to an attorney who has shown a lifetime commitment to working in the public interest and volunteerism.

11 Andrea L. Gage-Michaels opened the Gage-Michaels Law Firm in Green Bay, Wis. She helps seniors navigate crisis Medicaid planning, “silver divorce” proceedings, elder abuse concerns, and family mediation.

Dotun O. Obadina was named a partner with Jones Day, included by *The Deal* in its list of “Top Rising Stars,” and honored as one of “They’ve Got Next: The 40 Under 40,” *Bloomberg Law’s* award recognizing the accomplishments of “sterling young lawyers” nationwide. Dotun is partner at the Jones Day office in Minneapolis, Minn., specializing in mergers and acquisitions.

James D. Rael was named an assistant federal defender with the Federal Defender’s Office in Phoenix, Ariz.

12 Sabrina R. Gilman was spotlighted by Emerson for her LGBTQ + Allies work. She is a leader of the Europe chapter of the LGBTQ + Allies employee resource group. She has been with Emerson for 11 years, and her current role in Switzerland is as senior associate general counsel.

13 Derek A. Hawkins was named corporate counsel, IP, at Salesforce.

Lindsey A. Kujawa was named partner at Hansen & Hildebrand, Milwaukee. She has been an attorney at the firm since 2018.

14 Makda Fessahaye was named to *In Business Greater Madison’s* 40 under 40, 2021 Class. Fessahaye is director of the City of Milwaukee’s Department of Employee Relations.

Kristen D. Hardy joined Northwestern Mutual as assistant general counsel and assistant secretary.

Jared D. Widseth was named general counsel to Milan Laser Hair Removal in Omaha, Neb.

15 Joel M. Graczyk was named a managing associate in the litigation and dispute resolution group at Dentons US in Chicago.

Amanda P. Luedtke was named an administrative law judge for the state of Wisconsin.

18 David A. Richie joined Felhaber Larson in Minneapolis, Minn. He practices labor and employment law.

19 Hannah M. Compton joined Shumaker, Loop & Kendrick, in Tampa, Fla., as a member of the employment law practice group.

Brayton M. Deprey is a corporate associate at Kirkland & Ellis in Chicago.

Employment data for the most recent classes are available at law.marquette.edu/career-planning/welcome.



SHARE SUGGESTIONS FOR CLASS NOTES WITH CHRISTINE.WV@MARQUETTE.EDU.

We are especially interested in accomplishments that do not recur annually. Personal matters such as weddings and birth or adoption announcements are welcome. We update postings of class notes weekly at law.marquette.edu.



THE SUPREME COURT

Nationwide, the U.S. Supreme Court is the most respected branch of the federal government.

THE PUBLIC

Yet the standing of the Court in the public's eyes has declined recently, and partisanship among members of the public shapes their opinions of the Court and of specific decisions.

AND THE MARQUETTE LAW SCHOOL POLL

How do we know these things? Because of the Marquette Law School Poll's expanded commitment to shedding light on what people from coast to coast think about the Court. Nonpartisan and in-depth, the poll has become a major source for facts about the complex relationship between the Supreme Court and the country more generally.

The inaugural 2019 national survey was hailed as the "the deepest and broadest analysis of public opinion on the Supreme Court that anyone has done" (Professor Lawrence Baum of Ohio State University), and polls in 2020 and already this year have only expanded that work.

The Marquette Law School Poll has been providing insight into Wisconsin politics since its launch a decade ago—follow it now also to learn how Americans view the Supreme Court: law.marquette.edu/poll.